VOLUME I

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 518

THE ATLANTIC REFINING COMPANY, CITIES SERVICE PRODUCTION COMPANY, CONTINENTAL OIL COMPANY, ET AL., PETITIONERS,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, LONG ISLAND LIGHTING COMPANY, PUBLIC SERVICE ELECTRIC AND GAS COMPANY.

No. 536

TENNESSEE GAS TRANSMISSION COMPANY, PETITIONER,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, LONG ISLAND LIGHTING COMPANY, AND PUBLIC SERVICE ELECTRIC AND GAS COMPANY.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 518 PETITION FOR CERTIORARI FILED NOVEMBER 14, 1958
NO. 536 PETITION FOR CERTIORARI FILED NOVEMBER 24, 1958
CERTIORARI GRANTED JANUARY 12, 1959

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* This order is Exhibit E (pp. 56-63) in the Joint Petition dated October 11, 1957, of Long Island Lighting Company and Public Service Electric and Gas Company (No. 12403). This order and the ones issued May 20, 1957, June 24, 1957 and August 15, 1957 are omitted from the Joint Appendix pursuant to order of this Court dated February 24, 1958.

** This order is Exhibit F (pp. 64-72) in the Joint Petition, dated October 11, 1957, of Long Island Lighting Company and Public Service Electric and Gas Company (No. 12403).

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* This order is Exhibit A (pp. 19-34) in the Joint Petition, dated October 11, 1957, of Long Island Lighting Company and Public Service Electric and Gas Company (No. 12403).

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Application of New York Commission for rehearing and rescission of the order issued June 24, 1957, Docket Nos. G-11024, *et al.*, filed July 23, 1957	1003	466a
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* This order is Exhibit D (pp. 53-55) in the Joint Petition, dated October 11, 1957, of Long Island Lighting Company and Public Service Electric and Gas Company (No. 12,403).

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Petition for review of an order of the Federal Power Commission	477	475
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	Original	Print
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Order fixing dates for filing briefs before consolidated joint appendix is printed, etc.	689	650
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Order granting motion of respondent for enlargement of time for filing petition for rehearing	708	666
Order denying petitions for rehearing	712	667
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Clerk's certificate (omitted in printing)	715	669
Order allowing certiorari	716	669

DOCKET ENTRIES

1956

September 5—Letter, dated August 31, 1956 from Continental Oil Company to Secretary transmitting application for certificate of public convenience and necessity, Docket No. G-11024, received.

7—Letter, dated September 5, 1956, from Atlantic Refining Company to Secretary transmitting application for certificate of public convenience and necessity, Docket No. G-11034, received.

10—Application of Cities Service Production Company for certificate of public convenience and necessity, Docket No. G-11046, filed.

10—Letter, dated September 4, 1956, from Tidewater Oil Company to Secretary transmitting application for certificate of public convenience and necessity, Docket No. G-11049, received.

October 3—Notice of Applications, Docket Nos. G-11024, G-11034, G-11046 and G-11049.

18—Petition of the Brooklyn Union Gas Company to intervene as a party, Docket Nos. G-11024, *et al.*, filed.

18—Petition of Long Island Lighting Company for leave to intervene, Docket Nos. G-11024, *et al.*, filed.

19—Petition to intervene of Lake Shore Pipe Line Company, Docket Nos. G-11024, *et al.*, filed.

19—Petition of Tennessee Gas Transmission Company for leave to intervene, Docket Nos. G-11024, *et al.*, filed.

1956
October 22—Notice of intervention of Public Service Commission of the State of New York, Docket Nos. G-11024, *et al.*, filed.

25—Answer of Atlantic Refining Company to petitions for leave to intervene, Docket Nos. G-11034, *et al.*, filed.

November 5—Answer of Tidewater Oil Company to petitions to intervene, Docket No. 11049, filed.

1957
February 8—Notice of hearing, Docket Nos. G-11024, *et al.*

19—Designation of Presiding Examiner, Docket Nos. G-11024, *et al.*

20—Petition of Public Service Electric and Gas Company for leave to intervene, Docket Nos. G-11024, *et al.*, filed.

27—Order permitting interventions, Docket Nos. G-11024, *et al.*, issued.

28—Hearing held.

March 1—Hearing held.

4—Reference of motion to omit intermediate decision procedure, Docket Nos. G-11024, *et al.*, filed.

4—Presiding Examiner's certification of the record on motion to omit intermediate decision procedure, Docket Nos. G-11024, *et al.*, filed.

8—Order denying motion for omission of intermediate decision procedure, Docket Nos. G-11024, *et al.*, issued.

15—Errata transcript approved.

1957
March 18—Request by the Atlantic Refining Company and Cities Service Production Company for abrogation of denial of motion for omission of intermediate decision procedure, or alternatively for shortening of time for filing of exceptions, Docket Nos. G-11024, *et al.*, filed.

19—Motion of New York Commission for consolidation, Docket Nos. G-11024, *et al.*, filed.

20—Answer of the Atlantic Refining Company and Cities Service Production Company to motion for consolidation, Docket Nos. G-11024, *et al.*, filed.

20—Application of Tennessee Gas Transmission Company for reconsideration, Docket Nos. G-11024, *et al.*, filed.

22—Answer and objections of Tennessee Gas Transmission Company to motion of New York Commission for consolidation, Docket Nos. G-11024, *et al.*, filed.

22—Answer of New York Commission to Atlantic-Cities Service motion dated March 18, 1957, Docket Nos. G-11024, *et al.*, filed.

25—Telegram from Tidewater Oil Co. to Secretary requesting immediate and favorable action by the Commission in reconsideration of order refusing to omit the intermediate decision, received.

26—Telegram from Continental Oil Co. to Secretary joining in Tennessee Gas Transmission's application for reconsideration, received.

29—Supplemental certification of the record, Docket Nos. G-11024, *et al.*, filed.

1957

March 29—Presiding Examiner's decision upon applications for certificate of public convenience and necessity, filed pursuant to Section 7(c) of the Natural Gas Act, Docket Nos. G-11024, *et al.*, issued.

29—Order denying motion for rehearing and abrogation, request for oral argument, motion to consolidate and fixing time for filing exceptions, Docket Nos. G-11024, *et al.*, issued.

April 1—Errata notice correcting decision of Presiding Examiner issued March 29, 1957, Docket Nos. G-11024, *et al.*

8—Exceptions of Lake Shore Pipe Line Co. to initial decision of Presiding Examiner, Docket Nos. G-11024, *et al.*, filed.

8—Exceptions of Long Island Lighting Company to the initial decision of the Presiding Examiner, Docket Nos. G-11024, *et al.*, filed.

8—Conditional exception of The Atlantic Refining Company and Cities Service Production Company, Docket Nos. G-11024, *et al.*, filed.

8—Exceptions of New York Public Service Commission to decision of Presiding Examiner, Docket Nos. G-11024, *et al.*, filed.

9—Exception of Continental Oil Company and Tidewater Oil Company to Presiding Examiner's decision, Docket Nos. G-11024, *et al.*, filed.

9—Exceptions of Public Service Electric and Gas Company to the initial decision of the Presiding Examiner, Docket Nos. G-11024, *et al.*, filed.

1957
April 22—Findings and order issuing temporary certificates of public convenience and necessity, Docket Nos. G-11024, *et al.*, issued.

May 3—Petition of Consolidated Edison Company of New York, Inc., for leave to intervene, Docket No. G-11024, filed.

6—Application of Continental Oil Company, The Atlantic Refining Company, Cities Service Production Company and Tidewater Oil Company for rehearing, Docket Nos. G-11024, *et al.*, filed.

6—Notice of extension of time, Docket Nos. G-11024, *et al.*

9—Letter from Secretary to Bernard A. Foster, Jr., advising that the "application" has been accepted for filing as a motion for modification of the Commission's order issued April 22, 1957.

13—Answer of Tidewater Oil Company to petition of Consolidated Edison Company of New York, Inc., for leave to intervene, Docket Nos. G-11024, *et al.*, filed.

14—Answer of Public Service Electric and Gas Company to the motion for modification of the Commission's order issued April 22, 1957, Docket Nos. G-11024, *et al.*, filed.

16—Answer of New York Public Service Commission to applicants' motion dated May 6, 1957, Docket Nos. G-11024, *et al.*, filed.

16—Answer of Lake Shore Pipe Line Company in opposition to "Motion for Modification", Docket Nos. G-11024, *et al.*, filed.

16—Answer of The Brooklyn Union Gas Company and Long Island Lighting Company to applicants' motion to amend the Commission's order, Docket Nos. G-11024, *et al.*, filed.

1957

May 16—Answer of Tennessee Gas Transmission Company to motion for modification of Commission's order issued April 22, 1957, Docket Nos. G-11024, *et al.*, filed.

20—Findings and order issuing permanent certificates of public convenience and necessity and modifying previous order, Docket Nos. G-11024, *et al.*, issued.

June 4—Application of Tennessee Gas Transmission Company for rehearing and reconsideration, Docket Nos. G-11024, *et al.*, filed.

6—Order granting rehearing and fixing date for oral argument and specifying time allotted for argument, Docket Nos. G-11024, *et al.*, issued.

24—Order, upon application for rehearing, adopting initial decision of Presiding Examiner with modifications and conditions, Docket Nos. G-11024, *et al.*, issued.

July 11—Letter, dated July 9, 1957, from Cities Service Production Company to Secretary transmitting amendment to gas purchase and sales agreement, acceptance of certificate of public convenience and necessity and resolution adopted by the Board of Directors, received.

12—Letter, dated July 10, 1957, from Continental Oil Company to Secretary transmitting amendment to gas purchase and sales agreement, received.

12—Supplement to The Atlantic Refining Company's application for a certificate of public convenience and necessity; Atlantic Refining Company's acceptance of certificate of public convenience and necessity and resolution of Board of Directors, received.

1957

July 12—Letter, dated July 11, 1957, from G. M. Woodfin to Secretary transmitting amendment to contract between Tidewater Oil Company and Tennessee Gas Transmission Co., received.

22—Letter, dated July 18, 1957, from Continental Oil Company to Secretary transmitting the former's acceptance of certificate of public convenience and necessity and resolution of the Board of Directors, received.

22—Letter, dated July 16, 1957, from Tidewater Oil Company to Secretary accepting certificate of public convenience and necessity, and transmitting resolution of Board of Directors, received.

23—Application of Long Island Lighting Co. for rehearing, Docket Nos. G-11024, *et al.*, filed.

23—Application of Public Service Electric and Gas Company for rehearing and motion for stay, Docket Nos. G-11024, *et al.*, filed.

23—Application of New York Commission for rehearing and rescission of the order issued June 24, 1957, Docket No. G-11024, *et al.*, filed.

24—Application of Lake Shore Pipe Line Co. for rehearing, Docket Nos. G-11024, *et al.*, filed.

August 15—Order denying applications for rehearing, Docket Nos. G-11024, *et al.*, issued.

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[A] WITNESSES:				
Howard A. McKinley	23			
Howard R. Born	34			
William W. Witmer	45			
Howard A. McKinley		59		
Howard A. McKinley	143	145		

EXHIBITS:	Identified	Received
No. 1 (Map showing location of leases which is the subject of application, in the Gulf of Mexico.)	19	32
No. 2 (Folder entitled "In the Matter of Continental Oil Company, et al., Docket Nos. G-11024, et al., Gas Reserve Estimates.")	35	44

ITEMS BY REFERENCE:	Identified	Received
Item "A" (Gas purchase and sales agreement, dated August 17, 1956, between Tennessee Gas Transmission Company, as buyer and Continental Oil Company, as seller.)	19	22
Item "B" (Gas purchase and sales agreement, dated August 10, 1956, between Tennessee Gas Transmission Company, as buyer and The Atlantic Refining Company, as seller.)	20	22

	Identified	Received
Item "C" (Gas purchase and sales agreement, dated August 14, 1956, between Tennessee Gas Transmission Company, as buyer, and Cities Service Production Company, as seller.)	20	22
[B]		
Item "D" (Gas sales agreement between Tennessee Gas Transmission Company, buyer, and Tidewater Oil Company, seller.)	20	22

RECESSES:

Morning: 45

Noon: 80

Afternoon: 103 and 141 (two)

Transcript of Hearing Held February 28, 1957
[Vol. I]

[1] BEFORE THE

Federal Power Commission

In the Matters of:	
CONTINENTAL OIL COMPANY	Docket No. G-11024
THE ATLANTIC REFINING COMPANY	Docket No. G-11034
CITIES SERVICE PRODUCTION COMPANY	Docket No. G-11046
TIDEWATER OIL COMPANY	Docket No. G-11049

Hearing Room "D"
Federal Power Commission
G.A.O. Building
441 "G" St., N. W.
Washington, D. C.

Thursday, February 28, 1957.

The above-entitled matters came on for hearing, pursuant to notice, at 10:00 am.

Before—EWING G. SIMPSON, *Presiding Examiner.*

APPEARANCES:

ROLAND B. VOIGHT,
Box 2197, Houston, Texas, appearing on behalf of Continental Oil Company.

EDWARD J. KREMER, JR.,
Box 2819, Dallas, Texas, appearing on behalf of The Atlantic Refining Company.

Transcript of Hearing Held February 28, 1957 [*Vol. I*]

Appearances:

BERNARD A. FOSTER, JR.,
of Ross, Marsh & Foster, 725 15th St., N. W., Washington 5, D. C., appearing on behalf of The Atlantic Refining Company and Cities Service Production Company.

[2] CECIL C. CAMMACK,
Cities Service Production Company, Bartlesville, Oklahoma, appearing on behalf of Cities Service Production Company.

GENE M. WOODFIN,
Vinson, Elkins, Weems and Searls, 11th Floor, Esperson Building, Houston, Texas, appearing on behalf of Tidewater Oil Company.

ROBERT O. KOCH,
Tidewater Oil Company, Esperson Building, Houston, Texas, appearing on behalf of Tidewater Oil Company.

HARRY S. LITTMAN and
JACK WERNER,
317 Wyatt Building, Washington 5, D. C., appearing on behalf of Tennessee Gas Transmission Company.

EDWIN F. RUSSELL and
ROBERT B. LISLE,
Cullen and Dykman, 177 Montague Street, Brooklyn, New York, appearing on behalf of Brooklyn Union Gas Company.

Transcript of Hearing Held February 28, 1957 [Vol. I]

Appearances:

DAVID K. KADANE, General Counsel, and
EDWARD M. BARRETT, General Attorney,
250 Old Country Road, Mineola, L. I., New York, and

EDWIN F. RUSSELL and
ROBERT B. LISLE,
appearing on behalf of Long Island Lighting Company.

THOMAS F. RYAN, JR.,
Gallagher, Connor & Boland, 821-15th Street, N. W., Washington, D. C., appearing on behalf of Lake Shore Pipe Line Company.

J. HARRY MULHERN and
EDWARD S. KIRBY, 80 Park Place, Newark 1, New Jersey, and

WILLIAM R. DUFF, 1323 Wyatt Building, Washington, D. C., appearing on behalf of Public Service Electric and Gas Company.

KENT H. BROWN, Counsel,
55 Elk Street, Albany, New York, and

MORTON L. SIMONS, Assistant Counsel,
199 Church Street, New York 7, N. Y., appearing on behalf of New York Public Service Commission.

Transcript of Hearing Held February 28, 1957 [Vol. I]

[3]ROBERT L. RUSSELL, Assistant General Counsel, and

JOHN PAUL GENEAU, Commission Staff Counsel, appearing on behalf of the Staff of the Federal Power Commission.

Technical Aides and Consultants:

Olof W. Nelson, Assistant Chief, Bureau of Rates and Gas Certificates.

Michael Hamilton, Geologist.

Tom Williams, Engineer.

Joseph W. Lessig, Geologist.

Proceedings

[4] Presiding Examiner: The hearing in the matters of Continental Oil Company, Docket No. G-11024; Atlantic Refining Company, Docket No. G-11034; Cities Service Production Company, Docket No. G-11046, and Tidewater Oil Company, Docket No. G-11049, is called to order.

The hearing is convened by the duly designated Presiding Examiner pursuant to the Secretary's notice of application dated October 3, 1956, and the Secretary's notice of hearing dated February 8, 1957, each of which have been duly entered in this proceeding.

The hearing is on an application filed September 5, 1956, in Docket No. G-11024; September 7, 1956, in Docket No. G-11034, and September 10, 1956 in Docket Nos. G-11046 and G-11049, respectively, for certificates of public convenience and necessity pursuant to Section 7(c) of the Natural Gas Act, authorizing each of the applicants to render service as described in each respective application, subject to the jurisdiction of the Commission.

The Secretary's notice of hearing states that said applications have been on file with the Commission and open for public inspection, and further stating that each applicant proposes to sell natural gas in interstate commerce from production of a 25 per cent interest in leases in West Cameron, East Cameron and Vermillion areas, off shore the Louisiana [5] coast. The Tennessee Gas Transmission Company for resale.

The Secretary's notice of application states that these related matters should be heard on a consolidated record and disposed of as promptly as possible under the applicable rules and regulations of the Commission.

There has been received from the Records Officer of the Commission a memorandum certificate authenticated by the Secretary with respect to the service and publication of notice of hearing, which certificate is now handed to the reporter by the Presiding Examiner with the direction that it be set forth in the transcript at this point as though read.

FEDERAL POWER COMMISSION

February 19, 1957

IN THE MATTER OF CONTINENTAL OIL COMPANY, *et al.*	Docket Nos. G-11024, *et al.*

MEMORANDUM FOR THE PRESIDING OFFICER:

I hereby certify that the records in the Office of Administration show that notice of the hearing scheduled to commence on February 28, 1957, in the above-entitled

matter was published in the Federal Register on 2/14/57, 22FR, p. 938, and was sent on February 8, 1957, to the parties and interested persons of record and to States or other governmental authorities deemed to have an official interest in the proceeding.

/s/ CHARLES C. BENNINGTON
Records Officer

(SEAL)

[6] I hereby certify that Charles C. Bennington, Records Officer, whose signature appears above, is official custodian of the records of the Federal Power Commission upon which the above certification is based and was such official custodian at the time of executing the above certification.

/s/ J. H. GUTRIDE
Secretary

Presiding Examiner: By order issued February 27, 1957, and in the manner there provided, the Commission has permitted interventions by the Brooklyn Union Gas Company, Long Island Lighting Company, Lake Shore Pipe Line Company, Tennessee Gas Transmission Company and Public Service Electric and Gas Company.

Counsel may now enter their appearances for the record.

The applicants, first, Continental Oil Company.

Mr. Voight: For Continental Oil Company, Roland B. Voight, Box 2197, Houston, Texas.

Presiding Examiner: The Atlantic Refining Company.

Mr. Foster: May it please the Examiner, for The Atlantic Refining Company, Mr. Edward J. Kremer, Jr., Post Office Box 2819, Dallas, Texas, and Bernard A.

Foster, Jr., of Ross, Marsh and Foster, 7825 15th St., N. W.—and while I am on my feet, Mr. Examiner, if I may enter appearances also for Cities Service Production Company: For Cities Service Production Com- [7] pany, Mr. Cecil C. Cammack, whose mailing address is Cities Service Production Company, Bartlesville, Oklahoma, and also Bernard A. Foster, Jr., with mailing address as above.

Presiding Examiner: Tidewater Oil Company.

Mr. Woodfin: For Tidewater Oil Company, Mr. Robert O. Coch, Tidewater Oil Company, Esperson Building, Houston, Texas, and Gene M. Woodfin, of Vinson, Elkins, Weems and Searls, Esperson Building, Houston, Texas.

Presiding Examiner: The intervenors, Tennessee Gas Transmission Company.

Mr. Littman: Harry S. Littman and Jack Werner, 317 Wyatt Building, Washington 5, D. C.

Presiding Examiner: The purchaser interveners, Brooklyn Union Gas Company.

Mr. Russell: Cullen and Dykman, by Edwin F. Russell and Robert B. Lisle.

Presiding Examiner: Long Island Lighting.

Mr. Russell: Long Island Lighting Company, Cullen and Dykman, by Edwin F. Russell, Robert B. Lisle and David K. Kadane, General Counsel, and Edward M. Barrett, General Attorney, Long Island Lighting Company, 250 Old Country Road, Mineola, New York.

Presiding Examiner: Lake Shore Pipe Line Company.

Mr. Ryan: Thomas F. Ryan, Jr., 821 15th St., N. W., Washington, D. C.

[8] Presiding Examiner: Public Service Electric and Gas.

Mr. Kirby: J. Harry Mulhern and Edward S. Kirby, of 80 Park Place, Newark 1, New Jersey, and William R. Duff. My name is Kirby.

Presiding Examiner: The New York State Public Service Commission.

Mr. Simons: For the New York Public Service Commission, Kent H. Brown, Counsel, 55 Elk St., Albany, New York, and Morton L. Simons, Asssistant Counsel, 199 Church Street, New York 7, New York.

Presiding Examiner: Commission's Staff.

Mr. Geneau: For the Federal Power Commission, Robert L. Russell, Assistant General Counsel, John Paul Geneau, Commission's Staff Counsel; Olof W. Nelson, Assistant Chief, Bureau of Rates and Gas Certificates; Mike Hamilton, Geologist, Tom Williams, Engineer, Joseph W. Lessig, Geologist.

Presiding Examiner: Are there other appearances? (No response.)

Presiding Examiner: Apparently not.

The Examiner now calls upon counsel for each respective applicant to briefly state his position with reference to that application, what the applicant petitions for and what counsel expects to prove.

Continental Oil Company.

[9] Mr. Voight: Your Honor, this application covers the sale of gas under four different contracts from the four applicants. The gas is produced in the Gulf of Mexico, off shore from Louisiana. The sale is to Tennessee Gas Transmission Company. We believe that this is a typical certificate matter, and the only matter that is different in this particular case is the urgent necessity for prompt action for the certificates to issue, due to the fact that leases are imperiled if production is not com-

menced by 1958, and also due to the fact that in view of the weather situation in the Gulf of Mexico, a large portion of the year is not available for the construction of a line which must be laid, as the only method of taking production from these leases.

The leases are gas leases, only, no oil.

And our evidence will show, also, that it is imperative that construction on the lines start as promptly as possible, and that that is the urgency for prompt action on the applications by the Commission.

Presiding Examiner: Atlantic Refining?

Mr. Foster: Mr. Examiner, in view of the statement by Mr. Voight for Continental, the operator in this case, I may make a very brief statement with respect to, jointly, the applications filed at Docket No. G-11034, The Atlantic Refining Company, and G-11046, Cities Service Production Company.

In brief, Mr. Examiner, we anticipate that the evidence to [10] be adduced will suffice fully to serve as a basis upon which the Commission can make the required findings necessary to issuance of a certificate under Section 7(c) of the Act.

Presiding Examiner: Does it appear in the applications that Continental is the operator?

Mr. Foster: Yes, Mr. Examiner; it does so appear.

Presiding Examiner: Tidewater Oil Company.

Mr. Woodfin: Tidewater's position as an owner of an undivided one-fourth interest in these leases is necessarily the same as the position of Continental, Cities Service and Atlantic, and their opening statements may be adopted as Tidewater's statement.

Presiding Examiner: The position of the intervener Tennessee Gas Transmission Company?

Mr. Littman: Mr. Examiner, each of the applicants in these proceedings has requested a certificate of public convenience and necessity authorizing the sale of gas to Tennessee Gas Transmission Company. We have intervened in support of those applications to the end that appropriate certificates be issued to these applicants at the earliest possible date.

It is, therefore, our position in these proceedings that we fully support the applications that have been filed herein.

Presiding Examiner: The intervener Brooklyn Union and Long Island Lighting?

Mr. Russell: Mr. Examiner, I am not going to make any [11] definitive statement at this time. I would like to defer that until I have seen the proof put in by the applicants. As our petitions to intervene indicated, our concern in this matter is as to the price and the contract provisions and what their possible effect might be on Tennessee's other contracts.

It seemed to us in the beginning that those were matters primarily to be considered in the Tennessee certificate case, and yet we are a little puzzled, because here is a certificate case for the producers to supply gas to Tennessee which will be an important part of the Tennessee certificate case.

So far as this particular proceeding is concerned, as far as the producer certificates are concerned, we would have no objection to deferring whatever questions we wish to raise until the Tennessee certificate case, provided that we are not being prejudiced in any way by our failure to raise those questions in this proceeding.

It seemed to me just a little odd that you would have a certificate case for the producers before you would have the case where the gas is to be used certificated.

Presiding Examiner: Lake Shore Pipe Line Company.

Mr. Ryan: Mr. Examiner, Lake Shore has intervened in this case as a full requirements customer of Tennessee Gas Transmission Company. Tennessee is the proposed purchaser of the gas for which certificates are being asked in this proceeding. We intend to—our purpose in this proceeding is to have ex- [12] plored and determined all aspects of this proceeding which may relate to whether the public convenience and necessity requires the proposed sales and service by these applicants. We are concerned with certain elements of the contractual relationship between these applicants and Tennessee, particularly we are concerned with the matter of price.

It appears from the various contracts that the initial price, from Article 10 of those contracts is 21.4 cents, plus a possible additional gathering tax refund. This price is higher than any price known to Lake Shore being paid in the Louisiana and Texas areas.

We feel that the purchase of this gas by Tennessee will have a very definite impact upon the price—upon the rates charged by Tennessee to its customers. The volumes of gas involved here are sizable. It appears from Tennessee's related filing in Docket G-11107 that the quantity of gas may well exceed ten per cent of Tennessee's overall gas supply. Considering the fact that Tennessee's average cost of gas is considerably lower than the 21.4 cents involved here, it is obvious that the impact on the customers is going to be sizable.

Exactly what that impact will be, just can not be determined at this time. It can't be determined until we have had an opportunity to explore all the elements involved in Tennessee's certificate case.

We expect the applicants in this case to go forward on

[13] the burden of proof that the public convenience and necessity requires the issuance of these certificates.

We feel, also, that additional evidence other than the fact that these contracts were entered into at arms-length is necessary under the Commission's decisions.

Presiding Examiner: Public Service Electric and Gas.

Mr. Kirby: Mr. Examiner, the interest of Public Service Electric and Gas in these consolidated dockets stems from the fact that we are also a purchaser of natural gas from Tennessee, who is the purchaser in these dockets. Unfortunately, we are not in a position, we do not have sufficient knowledge to take a strong position, such as Tennessee did, and state flatly at this time that we are either opposing the applications or we are supporting them.

After we have that information and have had a chance to analyze the underlying contracts we will be in a better position to state further where we are.

But just preliminarily, I would like to say that we have the same doubts and the same feelings as have been expressed by counsel for Brooklyn Union and Lake Shore. The price seems high to us and we want to have a chance to examine the reasons behind the price and the need for the periodic escalation clauses which are involved, which seem to be high, too.

Basically, Mr. Examiner, we did not want to waive any rights we might have by not intervening in these dockets and then be [14] met possibly later on with a statement in the Tennessee docket that, well, "You sat by and let the certificates go and you should have raised the issue then.".

Presiding Examiner: The New York State Public Service Commission.

Mr. Simons: Our interest in this proceeding, Mr. Examiner, stems from the fact that, as has been noted, all of

the gas involved here is to be sold to Tennessee, and Tennessee is one of the major long lines, pipeline suppliers of the New York market, something between ten and twenty per cent of its gas wind up in New York, either directly or indirectly through the consolidated Natural and Columbia systems.

Other than that difference, I think I would go along with everything that counsel for Lake Shore Pipe Line stated.

The high price of 21.4 cents, plus the one-cent gathering tax, has been noted. There is also the step escalation clause of two cents each four years, which is the steepest step escalation known to us, and I think drastically changes the concept of step escalation.

I would also note that the final price called for in the contract just under step escalation alone is 35.4 cents, plus tax. That, of course, is some years down the road yet.

There is one other factor, of course, that relates to the economic feasibility. I think that that was touched on generally when public interest was spoken of. But the gas that is [15] involved here to our understanding is out in the Gulf somewhere, in 11107 Tennessee is proposing to spend some $15 million to construct 120 miles of pipe to bring it in from offshore on to land, and they are proposing to spend, as I understand their application in 11107, some $85 million more to build a new large-diameter pipeline from the point in Louisiana, where they will take the gas, from southeast Louisiana, to their main line of Portland, Tennessee.

So that there is involved here an expenditure of $100 million. Perhaps Tennessee can explain or will state that not all of that $100 million relates to this specific gas. But it looks like by the time the gas gets up to Portland,

Tennessee, it is going to carry an awfully high price. You can't buy gas at 22.4 cents out in the Gulf somewhere and wind up selling it in New York for the same price you could if you were buying it for 12 or 13 cents on dry land, which is, as I understand it, Tennessee's average price now, or at least as of the most recent date.

Beyond that, we would have to wait and see what case is put in by applicants. We are, as the other counsel have noted, somewhat mystified by the fact, first, that these dockets have not been consolidated with 11107; and secondly, assuming that they are not to be consolidated, we are further mystified by the fact that this case is proceeding first, rather than either following the pipeline certificate case or running concurrently with [16] it.

Perhaps that is simply a procedural matter, but it does indicate, as Mr. Kirby indicated, that it is necessary, apparently, to come in here to protect whatever rights we have.

Presiding Examiner: Very well.

Staff Counsel?

Mr. Geneau: Mr. Examiner, Staff Counsel has no statement to make.

Mr. Foster: Mr. Examiner.

Presiding Examiner: Are you going on to something else now? What is the procedural situation with respect to G-11107 in these consolidated dockets, Staff Counsel?

Mr. Geneau: I understand, Mr. Examiner, that I believe a notice of application has been put out on G-11107 and that interventions have been filed in that proceeding, and that the Commission has acted upon certain interventions in that proceeding, but as to whether or not the 11107 proceeding has been set for hearing or is to be set for hearing in the near future, I have no knowledge.

It is my understanding, though, that this proceeding will proceed separately and distinct from G-11107.

Presiding Examiner: All right.

Mr. Foster: There is one clarifying remark, if I may, I would like to refer to at this time.

In Mr. Kirby's opening statement he referred to the fact [17] that he had not had an opportunity to consider and analyze the contracts, I believe was the language he used. I am sure he did not intend to suggest that in any respect that applicants here were delinquent in contributing to that fact. Lest the record might possibly convey that impression, I would like to call attention to the fact that the notice of these applications involved here was published on October 11, 1956, and time within which petitions for leave to intervene expired some time shortly after that, I think on October 22, 1956.

Mr. Kirby's petition was filed, I believe, on the 20th of February, 1957, and it is obvious, too, I might add, that the Commission's order issuing today granting that intervention precedes the running of time within which applicants would be allowed opportunity to respond to that petition under the Commission's rules.

Presiding Examiner: How many witnesses does the applicant Continental expect to present?

Mr. Voight: One, immediately.

Presiding Examiner: And the applicant Atlantic? Cities Service?

Mr. Foster: For Atlantic Refining Company and Cities Service, Mr. Examiner, we do not at this moment expect the necessity to put on separately witnesses in support of these applications, apart from the presentation to be made otherwise.

Presiding Examiner: By Continental, the operator?

[18] Mr. Foster: By Continental and, to some extent, by the intervener Tennessee.

Mr. Woodfin: Same position for Tidewater.

Presiding Examiner: No witnesses?

Mr. Woodfin: No witnesses contemplated at this time.

Presiding Examiner: Tennessee Gas Transmission.

Mr. Littman: We shall have two witnesses, Mr. Examiner.

Mr. Ryan: May we have a statement from counsel for Tennessee as to the nature of the evidence which they are going to put on? I don't understand that they are applicant in this case. I am a little curious.

Mr. Littman: As I indicated, our position here is in support of the applications, and it will be testimony directed to support of these applications.

Presiding Examiner: Counsel, you may proceed.

Mr. Voight: Thank you, sir.

Mr. McKinley, will you take the stand.

Whereupon, HOWARD A. MCKINLEY was called as a witness, being first duly sworn, was examined and testified as follows:

Mr. Voight: If Your Honor please, before we start interrogating the witness, we would like to have certain matters identified.

Continental Oil Company asks that there be identified as [19] Exhibit No. 1 a map, which shows the location of the leases which are the subject of this application in the Gulf of Mexico.

Presiding Examiner: The document handed to the reporter may be marked Exhibit 1 for identification. That is the map.

(The document above referred to was marked Exhibit No. 1 for identification.)

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Mr. Voight: Continental Oil Company asks that there be identified as Item "A", the gas purchase and sales agreement, dated August 17, 1956, between Tennessee Gas Transmission Company, as buyer, and Continental Oil Company, as seller, which contract is attached as Exhibit B to the application in Docket G-11024, and we have a limited number of courtesy copies of that contract.

Mr. Ryan: May I point out that the interventions were not granted until last evening and interveners had no opportunity to request copies of those contracts. I think it is incumbent on the applicants to furnish copies to the parties.

Presiding Examiner: Item "A" for identification.

(The document above referred to was marked Item "A" for identification, by reference.)

Mr. Voight: If Your Honor please, off the record a minute, the typed copy is the actual exhibit, the printed copy is easier to read.

Continental Oil Company asks that there be identified as [20] Item "B" the gas purchase and sales agreement, dated August 10, 1956, between Tennessee Gas Transmission Company, as buyer, and The Atlantic Refining Company, as seller, which contract is Exhibit B in the application in Docket G-11034.

Presiding Examiner: Item "B", by reference.

(The document above referred to was marked Item "B" for identification, by reference.)

Mr. Voight: Continental asks that there be identified as Item "C" the contract, which is Exhibit "B" in Docket G-11046, which is the gas purchase and sales agreement dated August 14, 1956, between Tennessee Gas Trans-

mission Company, as buyer, and Cities Service Production Company, as seller.

Presiding Examiner: Item "C" by reference.

(The document above referred to was marked Item "C", for identification, by reference.)

Mr. Voight: Continental Oil Company asks that there be identified as Item "D" the gas sales contract which is Exhibit "B" in the application in Docket G-11049, which is the gas sales agreement between Tennessee Gas Transmission Company, as buyer, and Tidewater Oil Company, as seller.

Presiding Examiner: Item "D", by reference.

(The document above referred to was marked Item "D", for identification, by reference.)

Presiding Examiner: Is there objection by any participant to the receipt in evidence of Items "A" through "D"?

[21] Are those all the items you have to offer?

Mr. Voight: Yes, sir.

Mr. Ryan: May I ask counsel if this witness is going to sponsor those contracts or sponsor any one of those contracts?

Mr. Voight: He is going to identify them and testify to them.

Mr. Ryan: Did he participate in the negotiation of the contracts?

Mr. Voight: No, sir, he didn't participate in them, but he has custody of them.

Mr. Ryan: Will he be prepared to explain any ambiguities that may be contained in the contracts?

Mr. Voight: He will testify that he is familiar with the terms. As far as ambiguities are concerned, I haven't read more than three or four or five hundred gas contracts and I can't explain all of the ambiguities and we can't offer you a witness that we know will be competent to explain what you consider to be an ambiguity.

Mr. Ryan: Under those circumstances, Mr. Examiner, I don't know how far I may get in asking questions about these contracts. I would like to reserve a motion to strike these items.

Presiding Examiner: Motion to strike is always in order.

Mr. Woodfin: Mr. Examiner, I don't intend to stand on my feet here this morning, but I want to point out that these are [22] the contracts which are attached to the sworn applications which are on file and which are the nexus of this proceeding.

Presiding Examiner: I understand.

Items "A" through "D" are received and incorporated as evidence in this proceeding, by reference to the formal files of the Commission.

(The documents heretofore marked Items "A" through "D", for identification, were received in evidence by reference.)

Mr. Simons: Could I inquire before you commence your examination, Mr. Voight: You gave me a copy of the contract between Tennessee and Continental which has been identified as Item "A". Are the other contracts, Items "B", "C" and "D", identical in all respects, except for the name of the seller appearing on the cover sheet and wherever else it might appear in the contract?

Mr. Voight: And Section 17, which is on pages 24 and 25, of the other contracts, which designate Continental as the seller's representative to give and receive notices.

Mr. Simons: I see. I think I noticed, as you were describing them, some difference in the dates. Is that correct—was there a difference in the dates?

Mr. Voight: Yes.

Mr. Simons: I have August 17 for Continental and August 13 for Cities Service. Could you give me the other two dates?

Mr. Voight: August 10th for Atlantic, and August 14 for [23] Tidewater.

Mr. Simons: Thank you.

Presiding Examiner: Counsel.

Mr. Voight: Yes, sir.

Direct examination by Mr. Voight:

Q. Will you please state your name and your residence? A. My name is Howard A. McKinley. I reside in Houston, Texas.

Q. By whom are you employed, Mr. McKinley? A. Continental Oil Company.

Q. Where did you go to school, Mr. McKinley? A. St. Lawrence University, Canton, New York, Oxford University, Oxford, England.

Q. How long have you been with Continental Oil Company and what have been your various positions or activities? A. I have been with Continental for the past five or so years. During the first six months with Continental Oil Company I was in their Production Department. The following period of time I have been with Continental, I have been associated with their Land Department, and

during the majority of that time involved in and associated with their off-shore activities. At the present time I am Regional Land Superintendent, CATC, Marine Region.

[24] Q. Will you explain what you mean by Continental CATC marine region? A. Continental Oil Company, The Atlanta Refining Company, Tidewater Oil Company and Cities Service Production Company own equal, undivided interests in a number of leases on the shelf in the Gulf of Mexico. CATC is in effect an abbreviation of those four names. As a matter of convenience and as a practical matter the other three companies have designated Continental as operator of these leases, and as an organizational structure within the company CATC marine region exists, that is within the Continental Oil Company and it is manned wholly by Continental employees and their sole function is the operation of these properties.

Q. Have you been authorized by Continental to appear and testify on its behalf in this proceeding? A. I have.

Q. Mr. McKinley, Continental has filed an application in Docket G-11024 to sell gas to Tennessee Gas Transmission Company from certain leases in the East and West Cameron and Vermillion areas in the Gulf of Mexico, which leases are identified in a contract; Atlanta Refining Company has filed a similar application in Docket 11034, Tidewater has filed a similar application in Docket 11049, and Cities Service has filed a similar application in [25] Docket 11046, all of which have been consolidated in this proceeding and the four contracts have been identified as Items A, B, C and D. I hand you a map which has been identified as Exhibit 1 and I ask you, does this map correctly show the leases that are operated by Continental

and are subject to the four various contracts that have been identified? A. They are, and it does.

Q. Does Continental, as the operator of these leases market all of the production from the leases? A. No, under the several operating agreements the several parties thereto retain the responsibility and duty of marketing their own production and their interest in these leases.

Continental is merely the operator as a matter of convenience and has no authority or responsibility to market the production of the other parties.

Q. Does Continental own any interest in either of the other three companies? A. No, Continental has no interest in any of the other three parties, nor do any of the other three parties have any interest in Continental.

Q. Does Continental own any interest in Tennessee Gas Transmission Company? A. No, it does not.

[26] Q. Does Tennessee own any interest in Continental? A. No.

Q. Is that likewise true with respect to each of the other three companies? A. It is.

Q. Now, Mr. McKinley, I direct your attention to the contract which is Exhibit B in Docket 11024 which has been identified as Item A, which is a gas sales contract dated August 17, 1956. Are you familiar with the terms and provisions of this agreement? A. I am.

Q. Is that the contract that Continental has entered into for the sale of gas produced from its one-quarter interest in the leases that we have referred to? A. Yes, it is.

Q. Have the other companies also entered into the contracts that were identified as Items B, C and D, each for the sale of gas attributable to its particular quarter

interest in these leases? A. Yes, they have, and each company's representative negotiated the contracts for their interests, four separate contracts were executed.

Q. Now, in answer to Mr. Simons' question awhile ago, are the basic terms and conditions of these four contracts identical? [27] A. They are.

Q. Mr. McKinley, when are deliveries scheduled to commence under the terms of these contracts? A. November 1, 1957.

Q. How many acres are covered by these four agreements? A. Approximately 95,000.

Q. What is the total volume of gas dedicated under these four contracts? A. The present dedication is a dedication up to a maximum of two trillion cubic feet.

Q. Now, Mr. McKinley, up to the present time how many wells have been drilled by the four companies on these leases which are subject to these contracts? A. There have been 22 wells drilled on the leases, nine of which are dual completions, there are three rigs running now and there are 11 wells programmed, that is 11 additional wells programmed for this year, and, of course, there will be additional development in years to come.

Q. How will deliveries from these wells to Tennessee be affected under the contracts? A. At the platform. There are 9 platforms in place at the present time upon which there is either a well drilling or a well capable of producing, or both.

Q. Will Continental, as the operator, be able to [28] commence deliveries by the projected date of November 1st, 1957, in the event Tennessee is granted a certificate in ample time to construct the facilities necessary to accept such deliveries? A. We can see no reason why not.

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Howard A. McKinley—Direct

Q. You told us that the leases from which the gas will be produced are located in the Gulf of Mexico on the shelf offshore, Louisiana, were those leases obtained from the State of Louisiana or from the Federal Government? A. They originally, that is all of them were originally acquired from the State of Louisiana, and they have been continued under Section 6 of the Outer-Continental Shelflands Act.

Q. Now, Mr. McKinley, you have stated and the contracts show that the date on which deliveries are to be commenced is on or before November 1, 1957. Has your production department advised the company when they consider that the construction of the marine or water lines must be commenced in order to effect this delivery date, or schedule? A. Yes. The production department of Continental feels this way: That the only feasible time within which to, or during which one might construct a marine line out here would be during the spring and early summer, in order [29] to avoid the late summer-early fall hurricane season and also the late summer-early fall wave conditions, as a consequence of that opinion they have concluded that this line should be constructed or should be begun as soon as possible after April 1, 1957.

Q. Mr. McKinley, in addition to the necessity to have the deliveries commence by November 1st of this year, is there an additional and perhaps compelling reason why the marine lines must be fully constructed during the year 1957? A. Yes, there are. Each of the companies have been advised by their legal staff, legal departments that in order to comply with the obligations of the oil and gas leases and also in order to comply with the obligations of the Outer-Continental Shelflands Act and the rules and

regulations that have been adopted thereunder, that the reserves underlying these leases should be on production by 1958. Failure to have those reserves on production, it would appear to them and in their advice they so state, would place these leases in jeopardy. That is a risk Continental and the other companies are not willing to accept. The only practical way to produce these leases is by the construction of a pipeline and the taking of the gas via the pipeline route. As a consequence of that fact, we have entered into a contract with the Tennessee Company [30] to construct the facilities during 1957 in order to enable us to have this production in existence by 1958. However, to protect ourselves we have an option in that contract which allows us in the event Tennessee is unable to construct these facilities during 1957, an option which will allow us in sufficient time to take and explore other steps, which will enable us to insure production during or rather by 1958.

Q. Is that the primary reason for inserting in the contract the date of April 1, 1957, as the last date on which a certificate could be issued without giving the selling companies the right to cancel the agreement? A. That is right.

Q. Now, Mr. McKinley, in the event that satisfactory certificates are issued within the time provided in the contract, will Continental be ready, willing and able to perform its obligations under the contract?

Mr. Simons: I object to the question, I don't know what is meant by counsel when he says "satisfactory certificates."

Presiding Examiner: May I have the question?

(Question read.)

Presiding Examiner: What do you mean by satisfactory?

Mr. Voight: If Your Honor please, the contracts provide that unless satisfactory certificates are issued by [31] this date of April 1, 1957, the contracts can be terminated.

Presiding Examiner: Where is that?

Mr. Voight: That is Section 2-A of each contract.

Presiding Examiner: Section 2-A?

Mr. Voight: Yes, sir. It is on page 2 of the copy that you have.

Presiding Examiner: Objection is overruled.

The Witness: Could you give me the question again, Mr. Voight?

Presiding Examiner: Read the question, please.

(Question read.)

The Witness: Yes, they will. Continental is a major oil and gas company with very substantial assets, and they will be ready, willing and able to perform their side of this bargain.

By Mr. Voight:

Q. Are the other three non-operating companies likewise ready and willing to carry out their agreements under the circumstances outlined above? A. They are.

Mr. Ryan: Mr. Examiner, I have not objected to these questions relating to what the other companies are going to do. I assume on cross-examination this witness is going to be prepared to testify as to what the other companies are going to do likewise.

[32] Presiding Examiner: Very well.

By Mr. Voight:

Q. Are the other companies financially able to carry out their obligations? A. They are.

Mr. Voight: If Your Honor please, at this time Continental offers in evidence Exhibit 1, which is the map which has been identified. I might state that in each of the applications there is a map, but the four maps are made up by four different draftsmen, and some of them are large-scale and some of them small-scale, and this particular map shows the relation of leases to the Louisiana mainland.

Presiding Examiner: Is there objection?

(No response.)

Presiding Examiner: The Examiner hears none. The document offered is received.

(The document heretofore marked Exhibit No. 1 for identification was received in evidence.)

By Mr. Voight:

Q. Mr. McKinley, looking again at Exhibit 1, the map, is it correct that the squares off shore which have small numbers in them are each approximately 5,000 acres? A. That is correct. Some of these are subdivided and it is on an eliquot part basis. But each square, as such, is 5,000 acres, approximately.

[33] Q. And the vertical lines on the exhibit show the Vermillion area on the right; the East Cameron area, in the center; and the West Cameron Area on the left; is that correct? A. That is correct.

Mr. Voight: If Your Honor please, that is all the questions we have of Mr. McKinley.

Presiding Examiner: Are there any questions of the witness by the intervener Tennessee Gas Transmission Company?

Mr. Littman: No questions.

Presiding Examiner: Any questions by the intervener Brooklyn Union Gas Company?

Mr. Russell: No, sir.

Presiding Examiner: That is also for Long Island?

Mr. Russell: Yes.

Presiding Examiner: Lake Shore Pipe Line Company.

Mr. Ryan: Your Honor, I would prefer to defer the questions until we have heard the rest of the direct evidence that is going to be presented here, if we may.

Presiding Examiner: Any objection?

Mr. Voight: No, sir.

Presiding Examiner: Public Service Electric and Gas.

Mr. Kirby: Same position as Mr. Ryan has taken, sir.

Presiding Examiner: New York Public Service Commission.

Mr. Simons: So long as that is the position being taken, I will defer also.

[34] Presiding Examiner: Staff Counsel.

Mr. Geneau: Staff has no objection to the intervener's request.

Presiding Examiner: The witness is temporarily excused.

(Witness excused.)

Mr. Voight: If Your Honor please, we understand that Tennessee has two witnesses in support of the contracts and we do not want to close our evidence until the testimony of Tennessee's witnesses has been received.

Presiding Examiner: Very well. Otherwise, you have completed your case?

Mr. Voight: Yes, sir, according to our present thinking.

Presiding Examiner: And that is the position of the other applicants, the Examiner understands?

Mr. Foster: For Atlantic and Cities Service, that is correct, Mr. Examiner.

Mr. Woodfin: That is correct for Tidewater, Your Honor. It is understood, of course, that the witnesses which will be offered by Tennessee are offered in support of the application.

Presiding Examiner: Very well.

Tennessee Gas Transmission Company.

Mr. Littman: Mr. Examiner, we call Mr. Born as the next witness.

Whereupon, HOWARD R. BORN [35] was called as a witness, being first duly sworn, was examined and testified as follows:

Mr. Littman: Before proceeding with the testimony of this witness, Mr. Examiner, I would like to have marked for identification as Exhibit No. 2

a folder containing certain material which bears the title on the cover, "In the Matter of Continental Oil Company, et al., Docket Nos. G-11024, et al., Gas Reserve Estimates." I ask that be marked for identification as Exhibit No. 2.

Presiding Examiner: The document handed the reporter may be marked Exhibit No. 2, for identification.

(The document above referred to was marked Exhibit No. 2 for identification.)

Direct examination by Mr. Littman:

Q. Will you please state your name, residence and occupation, Mr. Born? A. My name is Howard R. Born. I reside in Houston, Texas. I am employed by Tennessee Gas Transmission Company, and have been since October, 1948. I am Director of the Reserve Department of Tennessee Gas, and part of the functions of this department is making gas reserve estimates and deliverability studies of fields and areas in which Tennessee has an interest or has gas purchase contracts.

Q. Will you please state your education and experience? [36] A. I was graduated from the University of Oklahoma, in January, 1938, with a Bachelor of Science degree in Geology, and since that time I have been actively engaged in the petroleum industry. A substantial amount of my work since graduation has been making reserve and evaluation studies on many gas and oil fields located in Texas, Mississippi, Louisiana, principally, and some in Arkansas, but the majority of my work has been in the Gulf Coast area.

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I am a member of the Houston Geological Society, the American Association of Petroleum Geologists, American Mining and Metallurgical Institute, Petroleum Division, also a registered professional engineer in the State of Texas.

Q. Have you previously testified before the Federal Power Commission? A. Yes, sir, I have. I testified in Docket Nos. G-962, G-1012, G-1248, G-1573, G-1969, G-2108, G-2331, G-8805, G-9448, and G-9454.

Q. And did the testimony in those dockets relate to gas reserves? A. They did, yes, sir.

Q. Will you state briefly the purpose of the testimony which you are about to give in this proceeding? A. I will testify as to the gas reserves involved in the instant proceeding. These estimates were prepared by me and under my supervision and direction, are located in the following [37] fields: Block 49, Block 62, Block 71, in the East Cameron off-shore area; Block 192 in the West Cameron off-shore area, located in Louisiana. These reserves are dedicated by separate contracts to Tennessee by Continental Oil Company, Atlantic Refining Company, Tidewater Oil Company and Cities Service Production Company.

Q. Will you please refer to the map which has been marked for identification as Exhibit No. 1, and state whether that map shows the leases involved in the estimate which you made and is that shown in a yellow color? A. Yes, sir, the reserves underlying the blocks which I have just named are included in the yellow-colored blocks in the map that has previously been included as an exhibit.

Q. Mr. Born, you have before you a copy of Exhibit No. 2, for identification? A. I have, yes, sir.

Q. Was that exhibit prepared by you or under your supervision and direction? A. It was.

Q. Does it contain the estimate of gas reserves to which you referred a moment ago? A. Yes, sir, this Exhibit 2 contains the estimates of gas reserves which I have made for the various fields located in acreage dedicated to Tennessee by the four companies I have previously mentioned.

[38] Q. Now, will you please describe the method used by you in computing these gas reserves, making such references to Exhibit No. 2 as you give your explanation, as will be helpful to an understanding of both the exhibit and your method of estimation? A. Well, in estimating these gas reserves I have used the volumetric method. I obtained the information in making these reserves from the operator, and I have from these electrical logs, and core descriptions and well-test information, I have constructed structural maps and I have determined the sand thickness based on electrical log and core information, and arrived at contracts based on production tests and electrical log information, and I have arrived at the proven area from this information and the structural maps which I had made, and which I defined the productive limits on which I have used.

Like I previously said, I have constructed an isopach map of the average pay thickness and I have arrived at the porosity and connate water based on core information which I have in these fields, as well as my experience and other information I have in similar fields along the Louisiana Gulf Coast area.

Reservoir temperature and reservoir pressure, I have based that on well information, as well as I have utilized

gradiant curves, which I have, which would give me both information as to the temperature, reservoir temperature and pressures; and I have arrived at the deviation factor for compressability [39] using the Katz and Brown curve. And from this I have used the volumetric formula to arrive at my gas in place, and I have assigned a recovery factor to this gas to arrive at my original recoverable reserves.

Q. I note from Exhibit No. 2 that it consists of a series of maps showing the acreage dedicated to Tennessee and committed by the applicants involved in this proceeding to the Tennessee contract, showing the location of the wells and other general information in pictorial form, and each of those maps is preceded by a tabulation setting forth, from lines 1 to 22, for example, on the first page of this exhibit, certain basic data.

Now, is there any further explanation that you would like to give that would be helpful in an understanding of any of those basic figures? A. Well, I have noticed on my first calculation sheet, reserve sheet for non-associated gas, in Block 49, I have the B.t.u. content of gas, which I have made to be above 1,000 B.t.u., which is normal for gas, a characteristic of gas in the Gulf Coast area.

I might point out on the map for Block 49 I have assigned, you will note, 640 productive acres, and there is no structural outline of the proved area. That is due to the fact that being two holes drilled there, there was not sufficient information to actually draw a structure. So based on the sand thickness and [40] other information which I have, I have determined a drainage area for this sand would be 640 acres.

Q. I note that on these maps you show a star, indicating, I presume, a well? A. That is a gas well, yes, sir.

Q. Those would be gas wells? A. Yes.

Q. All of this gas reserve involved in this proceeding is so-called non-associated gas; is that right? A. That is correct, yes, sir.

Q. It is not associated with oil? A. No, sir. All the gas reserves I have set up for the four contracts are all non-associated gas.

Q. I note that in a good many of these maps—take, for instance the third map that appears in Exhibit 2, you show a dotted or dashed line running between two wells. Now, the same is true on others of these maps.

What does that dashed line represent? A. May I ask you to further identify that map?

Q. That is the third one, Block 62, field, East Cameron. A. That would be the 6310-foot Miocene Sand

Q. Yes. That is the third map. I simply selected that at random, Mr. Examiner. A. Are you talking about the dashed line, the dotted line between A-1 and A-2 wells?

[41] Q. Yes. A. The A-1 was the first well drilled and it is a straight hole, the A-2 is a directional drill hole from the platform which the A-1 is on, and the dashed line indicates direction from the A-1 platform that the A-2 bottom hole location is.

Q. Would you just elaborate very briefly as to what you mean by a straight hole, as distinguished from a directional hole, and how it relates to this platform that I understand is out in the water of the Gulf of Mexico? A. Well, they have these drilling platforms and I guess, from a matter of economies, they build one platform and from this platform they drill several more wells, some-

times three, four, five or six, and they usually drill the first well straight down. Other wells drilled from a platform, naturally, you don't want to complete it the way you did the first well, so in order to further explore your structure, why, you deviate that hole in different directions, whichever direction you care to go, based on your geological and geophysical information.

So you direction-drill that well to the part of the field or lease, part of the lease which you want to go to and complete it there, because you don't want to, like I previously stated, just drill a bunch of wells straight down. This is also a matter of economics, where it is not economical to build a platform for each location, so you do multiple drilling off a single platform.

[42] Q. In other words, is it fair to say that the well designated in this particular instance as A-2 in that particular location, that is the bottom of the well, that is where the bottom of the well is located? A. Yes, sir, in that direction.

Q. Because of the fact that the drilling has been on a directional basis? A. That is correct, yes, sir.

Q. In other words, that dashed line does not mean that it is a field line or any other facility? A. No, that shows it comes off the platform on which the A-1 well was drilled.

Q. Is that true generally throughout this exhibit, wherever the terms A-1, A-2, A-3, A-4, and so forth, are used, A-1 being the first well on the platform? A. Yes, sir, that is substantially correct—that is correct.

Q. I note that in each instance, in each tabulation for each of the specific blocks you show the porosity of the sand, the thickness of the sand, the connate water and re-

coverable reserve and the basis by which you arrived at it; is that correct? A. Yes, sir, that is correct.

Q. Now, what is the amount of the reserve that you estimate to be recoverable from the leases dedicated by the Continental Oil Company, Atlantic Refining Company, Tidewater Oil Com- [43] pany and Cities Service Oil Company contracts? A. I estimate that the recoverable gas reserves under the acreage dedicated by these companies, four companies, through these four contracts, to be 1,673,929 MMcf at 14.73 p.s.i.a. pressure base.

Q. Stated in cubic feet, that would be 1,673,000,000,000 feet? I ask you that because frequently the reserves are spoken of in terms of cubic feet. A. Yes, sir, it would be 1,673,000,000,000 cubic feet of gas.

Q. Do you have an opinion with respect to the deliverability of these reserves? A. Yes, sir, I have. We have made deliverability studies on the whole Tennessee system, and in my opinion, based on the well information and number of wells to be drilled, the number of wells already drilled by the operator, that the volumes of gas which are specified within the contracts can be delivered to Tennessee.

For the first year this amount is 175 million cubic feet per day, and thereafter the contract quantity is on a reserve ratio basis.

Q. You just mentioned the figure of 175 billion cubic feet per day. At what pressure base? A. That would be on a 15,025 pressure base.

Q. Had you completed your answer? [44] A. Yes, sir. I had.

Q. How does your estimate of gas reserves compare with that of the operators for the producers involved in this proceeding? A. Well, in making these reserve estimates,

we worked along with the operator; he gave us the information, and when we made them, we agreed substantially with the operator.

Q. I take it, then, from what you said that in order to make this estimate in the first place, you had to obtain a great deal of basic information from the operators, themselves? A. Yes, sir, we certainly did, yes, sir.

Mr. Littman: Mr. Examiner, that completes the direct testimony of this witness.

I offer in evidence Exhibit No. 2.

Presiding Examiner: Is there objection?

(No response.)

Presiding Examiner: Exhibit No. 2 for identification is received in evidence.

(The document above referred to was marked Exhibit No. 2 for identification and received in evidence.)

Mr. Littman: I take it Your Honor will follow the same practice with regard to this witness' cross-examination? If so, I will call our next witness and proceed.

Presiding Examiner: Yes, counsellor.

The witness is temporarily excused.

[45] (Witness excused.)

Mr. Littman: Do you want us to proceed before the recess?

Presiding Examiner: Not necessarily. The hearing is recessed for ten minutes.

(Whereupon, at 11:15 a.m., a recess was taken to 11:25 a.m.)

Transcript of Hearing Held February 28, 1957 [Vol. I]
William W. Witmer—Direct

Presiding Examiner: The hearing will be in order.

Mr. Littman: I will ask Mr. William W. Witmer to take the stand.

Whereupon, WILLIAM W. WITMER was called as a witness, being first duly sworn, was examined and testified as follows:

Direct examination by Mr. Littman:

Q. Will you please state your name, residence and employment, Mr. Witmer? A. My name is William W. Witmer, I reside in Houston, Texas. I have been employed by Tennessee Gas Transmission Company since December, 1951, and I am Vice President in charge of the gas purchases.

Q. What is your education and experience, Mr. Witmer? A. I was graduated from the Agricultural and Mechanical College of Texas in 1948, with a Bachelor of Science degree in Mechanical Engineering, and from the Baylor University School of Law in January, 1951, with an L.l.b. degree. During 1951, [46] I was employed by the Texas Company as an attorney in the Legal Department, and since December, 1951 I have been employed by Tennessee Gas Transmission Company in various capacities involving the purchase of gas.

I have testified many times before the Federal Power Commission, supporting applications filed by Tennessee Gas Transmission Company in matters concerning gas supply.

Q. You have before you copies of the contracts between Tennessee Gas Transmission Company and the four applicants involved in this proceeding, which contracts have

been marked for identification, or have been identified as items "A", "B", "C" and "D", by reference.

Now, will you state whether you participated in the negotiation of those contracts on behalf of Tennessee Gas Transmission Company? A. Yes, I represented Tennessee in the negotiation of those contracts.

Q. Why did Tennessee Gas Transmission Company enter into those contracts? A. The purpose was to obtain gas reserves to supply the expansion of Tennessee's markets, as is shown in Tennessee's pending application in Docket G-11107. We felt that the purchase of the gas reserves covered by those contracts was particularly beneficial to Tennessee for several reasons.

First, the gas reserves are well-located, insofar as Ten- [47] nessee's system is concerned. Another factor which influenced the negotiations for this gas was that in addition to the large amount of gas reserves proven at the time of the negotiations, the dedicated acreage seemed to us to have a great potential for additional reserves which would probably be available to Tennessee as the acreage is developed in the future.

The purchase of this gas also afforded Tennessee an entry into the vast areas of prolific gas reserves situated off shore from the State of Louisiana, and in our opinion, placed Tennessee in a favorable position to acquire large reserves to be developed in the future, so that Tennessee could continue to meet the expanding demands of its markets.

In addition, it must be recognized that this was the only large package of gas for sale in the Gulf Coast area at the time. And evidently its advantages were realized by most of the other interstate gas transmission com-

panies, since the negotiations for the purchase of this gas were highly competitive among the interstate gas transmission companies in that area.

As is well known, the sale of gas reserves to interstate gas transmission companies has been very limited during the past couple of years.

Q. You have said that other transmission companies were interested in purchasing these reserves. Can you name any of the other interstate gas transmission companies which were actively engaged in the competitive negotiations for the purchase [48] of this gas? A. Yes, I can. It is my understanding that Southern Natural, El Paso, Transcontinental, United Fuel and American Louisiana were all interested in the purchase of this gas.

Q. Now, will you please explain the general terms of delivery and the dates by which such deliveries are to commence, according to the terms of the contract which you have described? A. Tennessee is obligated to construct to each of the platforms in the Gulf of Mexico, from which the gas wells have been drilled in the various fields that are covered by these contracts, and Tennessee is to commence taking gas on or before November 1, 1957.

In this regard, Tennessee is required to obtain a satisfactory certificate of public convenience and necessity covering the necessary construction for and purchase of such gas prior to or on April 1, 1957.

Now, the reason for the April 1 deadline is that the off-shore portion of the necessary off-shore construction can be accomplished only during the spring and early summer months, due to difficulties encountered from hur-

ricanes, rough weather, for the remainder of the summer and fall seasons.

So it was imperative that Tennessee be ready and able to commence construction of the gathering system not later than the early spring of 1957.

In the event satisfactory certificates are issued to the [49] applicants in these consolidated proceedings, and to Tennessee in its pending application, Tennessee stands willing and able to so construct the facilities necessary to receive and serve the gas covered by these contracts.

In the event Tennessee and the applicants in these consolidated proceedings do not receive satisfactory certificates by April 1, 1957, the contract may be terminated as provided in the contracts.

Q. Is there any affiliation between Tennessee and any of the applicants in these consolidated procedings? A. No, sir, there is not.

Q. Were the terms and conditions of these contracts which have been identified as Items A, B, C and D, arrived at as a result of arms-length bargaining? A. Yes, sir, they were.

Q. Over what period did these negotiations extend? A. We first approached these producers about the purchase of the gas covered by these contracts in October, 1955, and the negotiations continued from that time until contracts were finally executed by all the parties.

Q. Have you finished? A. Yes, sir.

Q. Do any of the provisions of these contracts affect or trigger any of Tennessee Gas Transmission Company's existing favored nations or renegotiation clauses in its other gas pur- [50] chase contracts? A. No, sir.

Q. Is any gas now being sold and delivered by any

producers in the area embraced by these contracts; namely, in the Vermillion, East Cameron or West Cameron areas off shore of the State of Louisiana? A. To the best of my knowledge, no gas is being sold in those areas.

Q. What effect will the purchase of the gas under these contracts have upon Tennessee's overall weighted average cost of gas? A. The weighted average cost of gas in 1957 to Tennessee, including the gas Tennessee is obligated to take under these contracts for the months of November and December of 1957 is about 12.71 cents per Mcf. The average cost of gas to Tennessee during 1957, excluding the gas covered by these contracts, but based on the same buying pattern otherwise, is approximately 12.54 cents per Mcf.

Q. I note the difference between those two figures is 23-hundredths of one cent; is that right? A. No, sir. The way I subtract them, it is about fourteen-hundredths.

Mr. Voight: Seventeen.

The Witness: Seventeen, yes.

By Mr. Littman:

[51] Q. You say it is what? A. Seventeen hundredths of a cent.

Q. Seventeen hundredths of a cent? A. Yes.

Mr. Russell: May I ask a question there for clarification, Mr. Littman, and Mr. Examiner?

Mr. Littman: Yes.

Mr. Russell: As I understood your question and Mr. Witmer's answer, the comparison you are making was the new gas that you are getting under these contracts being only included in your 1957

figures for the months of November and December; is that right?

The Witness: That is correct, that is when Tennessee is obligated to commence taking the gas, November 1, 1957.

By Mr. Littman

Q. Now, will you proceed to complete your answer as to the effect of the purchase of this gas, carrying the figure forward into the year 1958, which would be the first full year of operation under the application as filed in Docket G-11107 by Tennessee? A. For the year 1958, the weighted average cost of gas for Tennessee, including the gas covered by these contracts, at approximately 240 million cubic feet per day on a pressure base of 14.73 p.s.i.a., is approximately 13.70 cents per Mcf.

Using the same buying pattern and excluding the gas covered [52] by these contracts, the weighted average cost of gas to Tennessee for the year 1958 is about 12.73 cents per Mcf, making a difference between the two average costs of gas to Tennessee of approximately 97 hundredths of a cent per Mcf at that pressure base. I might add there, Mr. Littman, that those particular calculations do not reflect the possibility of price increases in other of Tennessee's contracts which do provide for price increases during the year 1958.

If those prices are allowed to increase, of course, the effect of this gas on Tennessee's average cost of gas would be smaller, percentagewise, than it is as I have given it.

Q. Will you describe generally, Mr. Witmer, what facilities will have to be constructed by Tennessee to enable it to receive the gas under these contracts and to deliver that gas into Tennessee's main transmission line? A. To build

to and receive gas from the nine existing platforms, and to put that gas into Tennessee's main line system at Kinder, Louisiana, will require 46.4 miles of 26-inch outside diameter line from Kinder, Louisiana, to the Louisiana shore-line, the cost of which, including all contingencies, will be $5,662,601.

The off-shore portion of the necessary construction to receive gas under these contracts, as the system is now designed, will be composed of 26-inch, 20-inch, 16-inch and 12-inch lines in the following amounts: 25.3 miles of 26-inch outside diameter [53] line, the total cost of which laid and in service is $6,034,508.

11.3 miles of 20-inch outside diameter line, the total cost of which placed in service would be $2,052,736.

12.9 miles of 16-inch outside diameter line, the total cost of which, when placed in service, will be $1,570,106, and 11.3 miles of 12-inch outside diameter line, the total cost of which, when placed in service, will be $995,461, making a total cost to put this gas to Tennessee's main line system, at Kinder, Louisiana, if my addition is correct, of $16,315,412.

Now I would like to reiterate here that this off-shore portion of this system must necessarily be built during the spring and early summer of 1957, due to the weather conditions.

Q. Do I understand this off-shore portion construction which you have just described involves construction of these lines which would be laid under water, extending from the shore of the Gulf, out to these nine platforms that have heretofore been described? A. Yes, sir, that is correct.

We have had experience in constructing similar facilities before in the West Delta area, which is also off the coast of

Louisiana, and in discussing this construction with our design engineers and our operating personnel, I am certain that we could construct the facilities during the spring and early summer of 1957, providing, of course, that we receive a satisfactory certificate by the time required in the contract.

[54] Mr. Simons: Referring to a certificate in G-11107, are you?

The Witness: Yes, I was, there, the Tennessee certificate.

Mr. Ryan: May I ask a clarifying question?

Mr. Littman: Just a minute. I am almost finished here, and I may be able, by these remaining questions, to supply the answers that are in the minds of the opposing counsel.

Presiding Examiner: Very well.

By Mr. Littman:

Q. Are the facilities which you have described a subject of Tennessee's pending application in Docket No. G-11107, among other facilities there applied for? A. Yes, they are.

Mr. Ryan: My question I wanted to ask went to the previous answer the witness gave. I would like to have the reporter read that answer back, if I may.

Presiding Examiner: Any objection?

Mr. Littman: I have no objection to having the answer read back.

Presiding Examiner: Very well.

(Answer read.)

Mr. Ryan: Thank you.

Transcript of Hearing Held February 28, 1957 [Vol. I]

William W. Witmer—Direct

By Mr. Littman:

Q. As Vice President in charge of gas purchases, have you satisfied yourself that the construction and operation of [55] these facilities which you have described is feasible from an engineering standpoint? A. Yes, sir, I am satisfied that from an engineering standpoint the construction of these facilities is certainly feasible, and as I stated before, that is based, of course, to a large degree, on our prior experience in constructing off-shore systems of this type.

Our design engineers and operating engineers have assured me that there is nothing particularly out of the ordinary in the construction of this system, as compared to the construction of similar gathering systems in which Tennessee has participated.

Mr. Littman: That completes—

Mr. Simons: I don't understand what is meant by feasible from an engineering standpoint. Could you explain that to me?

Presiding Examiner: Just a minute.

Are you through with your direct-examination?

Mr. Littman: Yes, I have completed my direct examination, and I should think that this inquiry could very well be answered on cross-examination.

Mr. Simons: I was confused by the answer. I would be happy to go through the routine of objecting to the question as we go along—

Presiding Examiner: You may answer.

The Witness: May I have the question repeated?

Presiding Examiner: What do you mean by feasible from an [56] engineering standpoint?

The Witness: By that I mean there are no particular technical problems involved in the construction which could not be overcome by normal engineering practices. Does that answer your question, Mr. Simons?

Mr. Simons: I am not sure. You will have to forgive me, I am not an engineer. Could you give me an example of a construction which you have come across which would not be a feasible one as you are using the term, from an engineering standpoint?

The Witness: Well, Mr. Simons, we haven't attempted any that we haven't been successful in constructing.

Mr. Simons: Apparently I have some difficulty in making myself understood even as you have some difficulty in making yourself understood to me.

The Witness: Perhaps so.

Presiding Examiner: Just a minute.

Mr. Simons: Could you give me an example of a proposed construction or one that was considered by Tennessee which came before you which, you determined was not feasible from an engineering standpoint?

The Witness: Mr. Simons, we haven't any that were not feasible. Let me put it this way: I suppose the first offshore construction that Tennessee did concerned us considerably more from a technical standpoint than this one does, purely because [57] it happened to be our first attempt at that type of construction. In that regard, however, we were successful in that venture, experienced no

particular difficulty, and the system certainly seems to be satisfactory. The conditions involved in the construction of the facilities that we are discussing here are very similar to those that we have encountered in the past.

By testifying that these facilities are feasible engineeringwise, I merely wanted to make it clear that there was nothing involved in this construction that would prevent Tennessee or keep Tennessee from being perfectly able to receive gas from these platforms.

Mr. Simons: Do you mean anything other than that the construction can physically be done?

The Witness: No, I mean nothing other than that.

Mr. Simons: I think that solves my problem in that particular.

The Witness: All right, sir.

Presiding Examiner: Does that complete your case?

Mr. Littman: Yes, Mr. Examiner. That completes our testimony in this proceeding.

Presiding Examiner: I suppose, however, we may go back and start the cross-examination with the first witness.

Mr. Ryan: May I ask if that completes the case of the applicants, Mr. Examiner?

Presiding Examiner: Yes.

[58] Mr. Voight: That is correct, sir.

Presiding Examiner: Very well.

Mr. Foster: So far as we can see the situation at this time, Mr. Examiner.

Mr. Woodfin: That is correct for Tidewater also.

Presiding Examiner: Very well. The witness on the stand is temporarily excused.

(Witness excused.)

Presiding Examiner: You may tender your first witness for cross-examination.

Mr. Kirby: May I ask if this examination is going to be clarifying or cross-examination at this time?

Presiding Examiner: Cross.

Mr. Kirby: Mr. Examiner, I am sure the Examiner doesn't expect us to cross-examine, for example, the geological witness in this case, Mr. Born. We have no method of checking his exhibit that he has put in. I am just using that as a striking example of the position we would be in.

Mr. Littman: Mr. Examiner, we would not in any event expect counsel, who has just spoken, to cross-examine Mr. Born concerning the gas reserves, because his petition to intervene does not show any particular interest in gas reserves. His intervention has been limited to price, to the matters concerning price. These interveners have expressed some concern about price, and that is about all I can find in their petitions to intervene [59] that would—that concerns them.

I believe their petitions—I am sure that the Commission has limited their participation here by its order to those matters alleged specifically in their petitions to intervene.

Presiding Examiner: We will get to that when the witness is tendered.

Mr. Kirby: Mr. Examiner, I am just pointing

out again that for this examination I don't think we should be limited to our complete examination at this time for cross.

Presiding Examiner: We will get to that.

Mr. Voight: Mr. McKinley, please.

Whereupon, HOWARD A. MCKINLEY was recalled as a witness, having been previously duly sworn, was examined and testified further as follows:

Presiding Examiner: Is there cross-examination of the witness who is now on the stand, the first witness that testified this morning? Is there any cross-examination by counsel for the intervener Brooklyn Union and Long Island Lighting?

Mr. Russell: No.

Presiding Examiner: By counsel for Lake Shore Pipe Line Company?

Mr. Ryan: I have a few questions, Mr. Examiner.

Cross-examination by Mr. Ryan:

[60]. Q. Mr. McKinley, does Continental have any present intention of exercising their option to cancel this contract in the event Tennessee does not receive a certificate by April 1? A. I will say this: that we are in the position where we can hardly conceive that we would be placed in that unfortunate position. However, in the event that we find ourselves confronted with the situation where we are not to have facilities constructed by Tennessee, we will undoubtedly have to explore other avenues of approach in effecting production from these leases, which we feel must be accomplished by 1958, in which event it would probably involve the seeking after non-jurisdictional

market or some other non-jurisdictional use, and probably the construction of the line.

Q. I understand that you stated on direct examination that it was urgent that your company and the other applicants receive certificates by April 1 because of construction in the Gulf. Are you referring to construction by Tennessee? A. Correct.

Q. Or by your company? A. And by us. It is something that would have to be done by then, if we concluded that constructing a line was the route we wished to go.

Q. What construction does your company have to do to effectuate these sales? [61] A. You are asking me a question I can't answer fully, I am afraid.

Q. Do you know— A. There are certain alternatives that perhaps might be able to discover. At the present time we see no other alternative than to build the lines ourselves, if that is the answer to the question.

Q. I am assuming that Tennessee builds all the facilities required under the contract. A. Right.

Q. What facilities do you have to build? A. Sorry, I didn't understand your question.

You are talking about, I think, perhaps the construction of other platforms?

Q. Construction of other platforms or any other facilities. Are there any pipeline facilities involved? A. Well, we will have facilities on the platforms. There won't be any pipeline facilities, if I understand the term as you are using it.

Q. You said that you presently have nine platforms; is that correct? A. That is correct.

Q. How many more are contemplated within the presently dedicated acreage? A. The drilling of additional wells?

[62] Q. That is correct. A. As I recall, there are two more.

Q. So that you will then have a total of 11 platforms to which Tennessee has to build in order to pick up this gas; is that correct? A. In the event of production, that would be correct.

Q. Where is the gas metered? Where will the gas be metered in selling it to Tennessee? A. It is my understanding that it will be metered on the platforms.

Q. On the platform? And that will be metered volumetrically—let me see if I can put this correctly—the metered volume will be the volume coming out of the well directly; is that correct? A. You are getting into problems where I am going to have difficulty answering. On the technical aspects of it, these questions place me in a difficult position. I don't know whether I could adequately answer that question. I would rather pass it.

Q. You are familiar that, under the terms of the contract, the sellers of this gas have an option to extract all of the heavier hydrocarbons in excess of 1,000 B.t.u.; is that correct? A. You must remember that I said I was familiar, that I wasn't intimately connected with it, in the sense that I knew it in detail. To answer that question adequately, I would have to [63] look at the contract.

Q. Let me refer you to Section 6 of the contract. A. What page is that on?

Q. Page 11, on the copy I have. A. Yes, same here. You are talking about 6(b)?

Q. That is right, Section 6(b) and Section 6(c).

Mr. Woodfin: Mr. Examiner.

Presiding Examiner: Yes.

Mr. Woodfin: I would like to point out in this connection—I don't know quite what Mr. Ryan is trying to get at here, but the contracts speak for themselves. These are provisions which are very clear. If he is asking the witness to read the contract I would just refer to the sections in the contract and then go on to the next question. The contracts speaks for themselves.

Mr. Ryan: I think Mr. Woodfin knows very well what I am getting at.

Presiding Examiner: Let's not get into any controversy between counsel.

Mr. Ryan: The question I am trying to determine is what volume of gas Tennessee is going to get and what are they going to pay for? The contract calls for a price of 21.4 cents, but I don't know what gas that is referring to. The sellers have the right to extract certain liquids from this gas. Now, if Tennessee is paying for that gas at the platform and the seller is then later allowed to extract up to ten per cent of the volume of that gas, then Tennessee is paying for gas it is not getting. In effect, it has a very direct effect upon the price.

Presiding Examiner: It may very well have. But what can this witness do to amend the contract?

Mr. Ryan: I am not asking him to amend it. I am just—my question was: where is the gas metered? From that point I can read the contract. I want to know where the gas is metered to Tennessee, and what gas is it that is metered.

Is it the extracted gas or gas that comes out of the well?

Presiding Examiner: What does the contract say?

Mr. Ryan: I don't find it in the contract, Your Honor. If somebody would point it out to me.

Presiding Examiner: Where is the contract provision, counsel, on that?

Mr. Ryan: I didn't hear the Examiner. May I have the reporter read the question?

Presiding Examiner: Yes.

(Statement read.)

Mr. Ryan: That is my problem, Mr. Examiner.

Presiding Examiner: Just a minute. Let him have a chance to answer.

Mr. Ryan: I am sorry, Your Honor. I thought you were directing the question to me.

[65] Mr. Russell: Could we take a short recess at this point?

Presiding Examiner: No. It is not necessary. Look at page 15.

Mr. Woodfin: Section 8(a).

Presiding Examiner: I don't see how you can interrogate this witness about the contract unless you lay some foundation for the interrogation.

Mr. Ryan: Your Honor, this man isn't even familiar with the contract. He just said so.

Presiding Examiner: You haven't established that. The objection is sustained.

Mr. Ryan: May I hear what the objection was? Could the reporter please read that?

Mr. Woodfin: I made the objection, Mr. Reporter. I said the contract spoke for itself and that the provisions are actually set out, and all that Mr.

Ryan was asking was that this witness should read the provisions of the contract into the record.

I think you will find that in the record, Your Honor.

By Mr. Ryan:

Q. Are you familiar with the take-or-pay-for provisions of this contract—of these contracts? A. I am familiar in a general way, yes.

Q. Am I correct in interpreting the contract that the take-or-pay-for is eighty per cent of the contract quantity?

[56] A. You are referring to the initial take-or-pay?

Q. Referring to paragraph 3(a). A. 1, 2 or I(2)?

Q. 3(a), I(2), that is correct, that is at the end—from and after January 1, 1958. A. From and after when?

Q. Excuse me, November 1, 1958. A. From November 1, 1957, until November 1, 1958, the take is or will be the lesser amount of 175,000 Mcf, or four-fifths of the maximum efficient rate of flow of these wells.

Q. That is the contract quantity, is that not correct? A. For that period, yes.

Q. For that period. From and after that period the contract quantity is 1,000 Mcf for every eight million Mcf of recoverable gas originally in place; is that correct? A. Correct.

Q. I am referring to Section 3-D-3, which provides quantity which buyer must either take or pay for. Am I not correct that that is eighty per cent of the contract quantity from and after November 1, 1958?

Mr. Voight: Pardon me, will counsel repeat his reference to the section?

Mr. Ryan: The Section is 3-D-3.

Mr. Voight: As I read the statement to which counsel is referring, is the total quantity equal to 125 per cent of the [67] contract quantity hereunder, and 3-D says "Buyer shall have the right to purchase and seller will install, maintain and operate necessary delivery facilities to deliver."

I think that refers to additional quantities. It has nothing to do with the question. For that reason we object to the question, sir.

Presiding Examiner: Very well.

Mr. Ryan: I will have to come back to that, Mr. Examiner.

By Mr. Ryan:

Q. Mr. McKinley, are you familiar with the other contracts which your CATC group has with Tennessee in the West Delta area? A. That one only in a very general way. My concern there would be with the leases affected, primarily, and the fact that they were being taken care of. As to the general terms of that contract, I only have a very general knowledge.

Q. You wouldn't know if the terms are similar, different or identical? A. I wouldn't know that.

Q. Do you know what the price is under that other contract? A. As I recall, it is 17 cents.

Q. Is that located off shore? A. It is located off shore but about 200-some odd miles away, over in the West Delta area.

Mr. Foster: May we inquire to counsel with respect to [68] the purpose he has in mind in pursuing these questions?

Mr. Geneau: In that connection, Mr. Examiner, this contract very definitely makes provisions—

Presiding Examiner: Will you please stand?

Mr. Geneau: —very definitely makes provision for the sale, apparently, of some gas from the West Delta area to be sold under the terms of this contract. So Staff is concerned with that problem also.

Presiding Examiner: Where do you find that?

Mr. Ryan: That is on page 7, Mr. Examiner.

Mr. Geneau: That is Section 3-J, Mr. Examiner.

Mr. Littman: May I have that section again?

Mr. Geneau: That begins on pages 6 and 7 of my copy of the contract.

Mr. Littman: What is the section number, please?

Mr. Geneau: 3-J.

Mr. Littman: 3-J?

Mr. Geneau: That is correct.

Mr. Voight: If Your Honor please, I think that Subsection 3-J speaks for itself. It is a substitution provision that says that up to a maximum of 25 per cent of 50 million a day may be delivered under this contract if the seller is prevented from delivering similar quantities from the reserves dedicated in the West Delta area. It is a substitution provision, but it doesn't say West Delta gas shall be sold. It is protecting [69] Tennessee for failure to deliver West Delta gas.

Mr. Geneau: That is the one thing we wanted to know.

Presiding Examiner: Now, we will come to Staff in the regular order.

Mr. Geneau: Yes, sir.

Mr. Ryan: You want to know the relevancy of my question?

Presiding Examiner: You are responding now to counsel's inquiry.

Mr. Ryan: The relevancy is this, Mr. Examiner. The West Delta contract is between the exact parties who are involved here, it is the only other off-shore contract that I know of between these parties. I think it is a perfect basis of comparison, find out what is the basis for the price in this contract. No evidence has been put in by the applicants. The applicants haven't put in evidence on anything that I can see.

Mr. Foster: May I be heard on that, Mr. Examiner?

Presiding Examiner: Yes.

Mr. Foster: It is our position, Mr. Examiner, that the decisions of the Commission make it abundantly and transparently clear, first, that there is in a certificate proceeding such as is before us here no issue and none can be injected with respect to the justness and reasonableness of the rate in the contract involved in the certificate application being considered.

[70] In other words, the Commission has said, as I understand its most recent decisions, very clearly, that it will not permit a Section 7 proceeding to be converted into a rate case under Sections 4 and 5.

Now, apart from that, Mr. Examiner—

Presiding Examiner: Where did the Commission say that?

Mr. Foster: Most recently, Mr. Examiner, as I

read its decisions, in three places recently. The first one, Mr. Examiner, was the order and opinion issued in Docket No. G-4250, Natural Gas Pipe Line Company of America, Opinion No. 299, which was issued the latter part of December or in December, as I remember it, of last year.

Soon after that, in the Houston-Coastal proceedings, Opinion No. 301, Docket Nos. G-9262, et al., Houston Texas Gas and Oil Corporation et al.

Still more recently, Mr. Examiner, in the Commission's order issued denying applications for rehearing on the first of the two cases to which I made reference.

And as I understand those, Mr. Examiner, and most particularly the last one, the Commission had very clearly made that plain. I shall respectfully refer to the Examiner's attention one sentence. This is from the order denying application for rehearing, issued January 31, 1957, in the Natural Gas Pipe case.

Presiding Examiner: I don't think you have to read that. [71] I will take a look at it at the luncheon recess. There is no question pending.

Mr. Foster: I had understood there was.

Mr. Woodlin: No question is pending.

Presiding Examiner: There is no question pending.

Mr. Foster: There is a question raised as to the relevancy.

Presiding Examiner: You were asking him a question about the line of his inquiry.

Mr. Foster: Yes, sir.

Apart from that, Mr. Examiner, just in order to make our position clear on that to Mr. Ryan, if I may proceed for a moment, Mr. Examiner, the counsel's inquiry ran to the matter of comparability, as I understood him, which he may seek to distinguish from the question as to justness and reasonableness.

Presiding Examiner: He may not pursue that any further.

Mr. Foster: I am fully aware of that, yes, sir. I think it might be helpful, though, to him and to all of us—

Presiding Examiner: I don't think we had better pursue that, from your viewpoint, unless he continues the line of inquiry.

Mr. Foster: I shall desist, then, Mr. Examiner.

Mr. Simons: May I note my disagreement with Mr. Foster's interpretation?

Presiding Examiner: Let's proceed with the cross-examination.

[72] Mr. Ryan: It is obvious, Mr. Examiner, that this witness doesn't know anything about the West Delta contract, so there would be no point in my pursuing it.

Presiding Examiner: All right.

Mr. Ryan: This next question may be more appropriately directed to counsel. Starting on page 7 of the contract, Article 4, there are provisions relating to dedication of acreage. Subparagraph A of paragraph 4 provides for the dedication of 25 per cent of two trillion cubic feet as the amount dedicated under this contract at this time.

Subsequent subparagraphs of that paragraph 4 provide for an option to the seller to dedicate additional gas. I would like to know what the applicants, in that connection, what the applicants are requesting certificate authority for in this case.

Mr. Woodfin: If I might respond to that on behalf of Tidewater, we have shown no exercise of the election of any option. We are asking for a certificate to make the sale under the terms of this contract, in accordance with its provisions. Up to this date there has been no exercise of any option. I don't think we even get to that question, and there is no sense worrying about it in this proceeding.

Right now the dedication is two trillion feet of gas in these proceedings, and Tennessee has shown, in the present stage of development, there is already 1,600,000,000 shown [73] there.

Mr. Ryan: Is it counsel's view that any certificate issued here would cover the possible dedication of additional acreage?

Mr. Woodfin: I don't have any view on that, Mr. Ryan, I am not to that point.

By Mr. Ryan:

Q. Mr. McKinley, Article 6-B refers to U. S. Highway 90 in Jefferson Davis County or Calcasieu Parishes, Louisiana. Could you perhaps, on Exhibit 1, show me, approximately where that point would be? A. It will about split Calcasieu Parish and Jefferson Davis. It runs from Lake Charles to Lafayette.

Q. Do you have any idea how far on shore that is from

these leases? A. It would be an estimate. It would be about thirty miles.

Q. About thirty miles? A. As an estimate.

Q. How far out into the Gulf are these leases, Mr. McKinley? A. They run from 25 to 30 miles out. I have in my briefcase precisely the measurements on each lease if you are interested in that.

Q. No, approximately. A. It is approximately a 30-mile average. In some places [74] it is less.

Q. Do you know anything about the physical characteristics of the gas which will be produced from these leases? A. I do not.

Q. Presumably you wouldn't know what volume of gas might be permissibly stripped by the sellers before it is ultimately delivered to Tennessee, then? A. No, I would not. Incidentally, going back to that distance question again, I would like to retract what I have said. That would be closer to between 15 and 25 miles. Take yourself an average on that. I was counting the blocks and I miscounted them.

Q. For the record, Mr. McKinley, on page 20, would you refer to the paragraph referring to the State of Louisiana or Federal Government taxes?

Mr. Voight: Is that in Section 10?

Mr. Ryan: That is in Section 10, that is correct.

By Mr. Ryan:

Q. Do you have that before you?

Is there any tax now imposed by the State of Louisiana with respect to this gas? A. There has been no production as yet.

Q. Is there any tax which will be applicable to this gas

when production commences? A. Assuming that these are state leases there would be [75] the normal state production tax.

Q. Assuming that— A. Some of them are state leases and others are not, obviously.

Q. Assuming they are Federal leases, what is the situation with respect to taxes? A. There is no tax in the normal sense that one would find—to my knowledge, as one would find in the case of State of Louisiana's rate schedules on taxes.

Q. Is there any equivalent which is referred to here which must be paid by Tennessee to the seller? A. There is an equivalent in the sense that there is an additional royalty applied on Section 6 leases in the amount of Louisiana gross production taxes, as of the passage of the Act in August of 1953.

Mr. Ryan: May I have that read back, please?

Presiding Examiner: Yes.

(Answer read.)

By Mr. Ryan:

Q. I am not sure I understand that. A. I am not sure, either.

By Mr. Ryan:

Q. Assuming that these are Louisiana leases, what is the amount of that tax? A. I am not familiar with the scale as of right now.

[76] Q. Assuming that they are Federal leases, what is the amount of the equivalent? A. It would be as it existed at the time of the passage of the Act.

Q. What Act are you referring to? A. The Outer Continental Shelflands Act. The schedule at that time, of course, depends on the wells themselves, and I am not that familiar with the tax schedule as of that time.

Q. Assuming that these are Louisiana leases, what royalty does the State reserve to itself? A. These are one-eighth leases.

Q. Would the same be applicable if they were considered Federal leases? A. One-eighth plus the additional royalty.

Q. Would you refer, please, Mr. McKinley, to Section 3-J, on pages 6 and 7?

On page 7 is the phrase "which seller is then prevented from delivering to buyer." Could you explain to me whether that means which seller has been prevented prior to the substitution or which seller will subsequently be prevented from delivering from the West Delta area?

A. You are asking me a point of interpretation. I am afraid I couldn't answer that adequately.

Q. Under Article 7, Mr. McKinley, on page 13, "Seller agrees that the gas will have certain qualities upon delivery." [77] Would you explain to me whether that means upon delivery at the platform or upon delivery on shore, after extraction of hydrocarbons by the seller, on shore, after extraction of hydrocarbons by the seller on shore.

Mr. Voight: If Your Honor please, if counsel will be kind enough to read the balance of the contract, we would like to say that these contracts have been on file with the Commission for approximately six months. 8-B says: "The points of delivery for all gas delivered to buyer hereunder

shall be at the valve on the discharge side of seller's meter to be located on each of the platforms."

I believe that the contract speaks for itself, and there is no purpose to be served by asking the witness what the contract says. We object to that question.

Mr. Ryan: Your Honor, it seems to me, in light of counsel's statement, that there is a conflict in the contract. The seller has the right to extract hydrocarbons on shore. If that is the situation, and the seller is only guaranteeing 1,000 B.t.u. gas at the platform, it seems to me it is in conflict.

Presiding Examiner: Very well.

Did you negotiate the contract on behalf of Continental?

The Witness: No, I did not. However, from the very beginning it was on the basis of the advice of the Legal Department and the Land Department that this contract—not the contract, [78] but the sale of this gas was initiated, and during the entire negotiation we were in and out of it. The technical phases of it, the price aspects of it didn't fall in my province. However, we were in and out of the negotiation at one time or another throughout its entirety.

Presiding Examiner: You can't answer this question?

The Witness: I don't believe I can.

Mr. Ryan: Under those circumstances, Mr. Examiner, I have no further questions of this witness.

Presiding Examiner: All right. Cross-examination by counsel for Public Service Electric and Gas Company.

By Mr. Kirby:

Q. Mr. McKinley, just in what position are you testifying here, as the manager of a certain department, the CATC Department? A. No; I am testifying as Regional Land Superintendent, Continental Oil Company, with the authorization to speak for Continental Oil Company.

Q. In that position do your duties require you to become familiar with the various contracts of sale of the gas of Continental? A. Only insofar as they will touch a particular lease and the obligations that might fall within the province of the Land Department.

Q. That department, I take it, is only concerned with the [79] offshore section? A. That is correct.

Q. I didn't catch it in your qualifications, but I take it you are an engineer; is that right? A. No, I am not.

Q. When you testified, then, that the four companies were ready, willing and able to perform, I assume you based that on hearsay; have you? Especially the "able" part? A. Well, I hardly think it was hearsay. My statement was based on the advice that I was given, and if you classify that as hearsay, I guess that is hearsay.

Q. What I mean is, you didn't make a personal examination of any engineering plans as to how the gas was to be secured— A. No. If I did, I wouldn't be sure at what I was looking at.

Q. You do know, of course, I assume, that these applicants have other outlets for sale to interstate pipelines; is that correct? A. Throw that question again.

Presiding Examiner: Yes.

(Question read.)

Mr. Woodfin: May I interpose an objection? I never heard of a clarifying question to a question on cross-examination, but that is about what it is. Does he mean from these leases, [80] or leases located elsewhere? I don't quite understand what his cross-examination is, Mr. Examiner.

The Witness: That is my feeling, too. Well, I am not following you.

Presiding Examiner: Just a minute.

Counsel?

Mr. Kirby: To clarify the question to counsel, I meant before that applicants are making other sales to interstate pipelines, and the reason I asked this question of the witness is that he did mention something on direct-examination that they were going to look for other outlets at a certain time, being April 1—

Presiding Examiner: The objection is sustained.

The hearing is recessed to reconvene in this room at 2 p.m.

(Whereupon, at 12:32 p.m., a recess was taken to 2:00 p.m.)

[81] AFTERNOON SESSION 2 P. M.

Presiding Examiner: The hearing will be in order.

Whereupon, HOWARD A. McKINLEY resumed the stand as a witness, having been previously duly sworn, was examined and testified further as follows:

Presiding Examiner: Do you have further questions on cross-examination?

Mr. Kirby: Just a few questions, Mr. Examiner.

Cross-examination (Cont'd) by Mr. Kirby:

Q. When you said there was no connection between the applicants here and Tennessee, and among themselves, were you speaking of such things as stock control possibilities or stock interests or interlocking directorates; is that what you had reference to? A. That is what we had reference to, that is what I had reference to.

Q. What investigation did you make to determine that, in your opinion, there was absolutely none? A. The investigation made was this: that we inquire of the companies, in my case, for instance, Mr. Dominic, who is Secretary for Continental Oil Company, gave me a statement to that effect, which I have with me, if you will. And I have been informed similarly by Tidewater, Cities Service Production [82] Company and the Atlantic Refining Company.

Q. And what did you do with respect to Tennessee? A. With respect to Tennessee, I have been advised they have no interest in us, through Mr. Dominic and the others, and our interest in them, the same thing.

Q. Mr. Dominic is what? A. He is Secretary for Continental, and I have been advised by the other companies similarly.

Q. Now, do I take it that you are testifying for the four

applicants as what we would term the policy witness? A. Testifying for Continental as such, yes.

Q. With respect to Continental—

Mr. Woodfin: May I make the statement on the record that we propose to adopt the testimony of Mr. McKinley, for these policy matters; that he is also speaking for Tidewater as our witness in this case.

Mr. Foster: I think, as is obvious from earlier statements, that would likewise be the case with respect to the other two applicants.

By Mr. Kirby:

Q. Then if the Commission should issue certificates in these two dockets conditioned upon Tennessee receiving a certificate, would that be satisfactory to you and to the other companies? A. That would be a difficult question for me to answer, [83] of course, not seeing what the conditions might be. But as you spell it out, we would have to look at it, I am sure, and it would be a matter for decision at that time.

Q. You mean that you would have to consult with the companies involved before you could determine the answer? A. I would say that would be a fair answer.

Mr. Kirby: I have no further questions.

Presiding Examiner: Counsel for the New York State Public Service Commission.

By Mr. Simons:

Q. Mr. McKinley, you stated you attended St. Lawrence University and Oxford University. Did you receive any

degrees from those institutions? A. I received one from St. Lawrence, two from Oxford.

Q. I am sorry. A. Received one from St. Lawrence and two from Oxford.

Q. What were those degrees in? A. Bachelor of Arts from St. Lawrence, and I am assuming what you want is the major field of concentration?

Q. Yes. A. I would say in that instance Political Science. And essentially the same might be said of the degrees from Oxford. They are, again, BA and MA concentration, Political Science.

The way their degrees are set up over there, you concentrate in a certain field, it is politics, economics and philos- [84] ophy. The concentration would be, in our terminology, as we see it, political science. Is that what you wanted?

Q. Yes. Now, you stated that you have been with Continental for five years, I believe, and that you are now Regional Land Superintendent of the marine unit, CATC region; is that correct? A. Regional Land Superintendent of the CATC Marine Region, correct.

Q. What are your duties in that regard? A. My duties in that regard relate specifically to the leases, themselves, from the acquisition through to and including the development of them and the disposition of them at the end of their usefulness to us.

Q. How many people do you have working under you as Superintendent? A. Fifteen.

Q. Fifty? A. No, 15.

Q. I am sorry. To whom do you report in the company? A. My initial supervisor or immediate supervisor is the Exploration Manager for that region.

Q. What is his name? A. Mr. John H. Davis.

Q. You stated that your duties pertain to the leases [85] from the time of their acquisition, onward. Could you spell that out a bit further, just what your department does? A. This is a problem land people have in almost any instance, trying to put it in such a manner, truncated, so that we could get it over in something less than three days. Let's take one instance, one lease: We purchase a lease from let's say the Federal Government in a particular lease sale, the preparations up to that, to and including the clearing of what title problems we have, to and including the preparations for the sale, itself, to and including the actual preparation of the bid is conducted and carried on by the Land Department.

We acquire the lease, and from there on, if we have a joint interest operation through a working interest basis, we negotiate the contract. We are responsible for seeing that lease is taken care of in the sense that as in this case, where we are compelled to face up to a possible risk, at that point we are in constant consultation with our Legal Department, and at that point we make our recommendation through the Manager of Exploration to our management, and that would include, as a counterpart measure, to the Production Department as well, that we feel, in light of the circumstances, something has to be done with this lease.

Now, our duties in addition to that are extraneous to the leases, not actually, but we carry on the so-called scout- [86] ing function, we carry on the statistical aspect of it, we carry on the maintenance of contacts with the various Governmental agencies involved, and here there are a number, and that sort of thing.

Is that sufficiently confusing?

Q. I think that is a start. I will see if I can go a bit further. What essentially is the nature of your unit? I take it it is not a legal proposity. Is it engineering or political, or just how would you ... orize it? A. My unit by that you mean the land group.

Q. Yes, of which you are the supervisor or superintendent, rather. A. Well, I would categorize it in this way, that we have the supervision over the leases. That generally would be the way I would put it to anyone.

Q. Are the people who work there engineers? A. No, they are not, they are generally—well for instance, typical would be my assistant, who is a graduate of the University of Colorado, Denver Law School and Harvard Business School of Administration. That is the type of man that is involved.

Q. But you are not a legal unit? A. Not a legal entity. When we want a legal question answered, we go to our Legal Department.

Q. And in the acquisition of the lease, is your legal [87] unit also involved in that? A. They may be, in the event there is a title situation which needs looking into. They may be in the event that there is some question as to the manner in which a lease has been advertised by either the state or the Federal Government.

Q. Who determines whether or not a particular lease should be acquired? A. That is a joint determination.

Q. By whom? A. Within Continental.

Q. Is that someone at a higher level than you? A. No, not necessarily. Of course, they can overrule our recommendations, but we are the ones that come up with the recommendations, in any event, and then it would go on up. It is a discussion on various levels.

Q. Are you responsible for the initial recommendation that a specific lease be acquired? A. The Exploration Department, of which I am part, is responsible for that.

Q. Would it more specifically be the responsibility of Mr. John H. Davis? A. You would say that he had the overall supervision of the group that developed the recommendation. It wouldn't necessarily be his alone; that is, the recommendation.

Mr. Woodin: Mr. Examiner, I haven't objected to this [88] long line of questioning. I am very curious as to what Mr. Simons is attempting to prove here. Mr. McKinley has testified that he is authorized to appear here and testify as the policy witness on behalf of Continental and on behalf of these other companies. Now, if Mr. Simons is attacking his precise qualifications as to any particular portion of the testimony, we will be very happy to take the time to bring any witness here which will satisfy him. But I just don't quite understand this line of questioning.

It seems to me that it is interesting, but it is certainly time-consuming.

Mr. Simons: It has only consumed about five minutes so far, Mr. Examiner. I would think that you can always examine any witness' qualifications.

Presiding Examiner: Objection is overruled.

By Mr Simons:

Q. How long have you been regional land superintendent of this particular unit? A. This unit has been in existence for 18 months and I have been its regional land superintendent for that length of time. However, previous to that,

and for virtually all my experience in the Land Department we have been involved in their off-shore activities which would include these properties, and in addition, other properties.

Q. What was your title immediately prior— [89] A. Division Land Superintendent.

Q. What is that? A. Division. It was at that time on a divisional level. At that time, in addition to the C.A.T.C., as we call it, or the Continental-Atlantic-Tidewater-Cities Service properties, we, within Continental, handle the other properties that we had off-shore.

Q. The particular leases that we are talking about, the area of which is covered by the map which is Exhibit No. 1 here, those leases run to each of the four applicants: is that correct? A. That is correct.

Q. And your responsibility as an officer of Continental would simply be as to the one-quarter lease interest? A. My responsibility goes a little further than that. Under the contract we have assumed the role as operator of these properties, and as such, we have to carry on in that role as well.

Q. When were the leases originally obtained? A. They were obtained, I think, as I recall—I can give it to you specifically, I have it in my brief-case—

Q. If you would, please. A. I can give it to you from memory. They were two or three sales; one of them I notice here is the May 10th, '48 sale. There was one in February, as I recall.

[90] Q. February what year? A. Wait a minute, let me determine that.

Q. Certainly, take all the time you need. A. November 19, 1948, May 10 of '48, March 15 of '48, July 19 of '47. I had a recollection there was one in February.

Q. Now you speak of a sale. Are you referring to a lease from the State of Louisiana to Continental as a sale? A. A sale conducted by the State Mineral Board at Baton Rouge.

Q. And that is how you obtained your lease? A. That is correct.

Q. Now, you gave four different dates from July, 1947, to November, 1948. Were those all sales to Continental? Or did they include others? A. Yes, they did.

Q. Did each of them include others? A. Yes, sir.

Q. Do each of the four sales relate to a different area? A. They would relate to a number of areas. I don't recall offhand how many areas were involved in each of the sales. My recollection is this: that the only sale that pertained to a single area was the very first sale in '45, which pertained only to the Eugene Island area. Only one participant in that—Magnolia Petroleum, but all the others involved more than one area and more than one participant in the sale, to my recollec- [91] tion.

Q. I take it that you were not with the company, with Continental, at the time Continental and the other applicants acquired these leases? A. That is right.

Q. From the State of Louisiana? A. That is correct.

Q. I believe you stated that you had been authorized by Continental to appear here. Who in Continental, what officer authorized you? A. Mr. O. L. Fisher, Vice President and General Manager of Continental's Southern Region.

Q. I believe you stated you were authorized to appear as the policy witness. Was that the specific authorization given to you by Mr. Fisher? A. Mr. Fisher authorized me

to appear on behalf of Continental Oil Company. He didn't put in the words "policy witness", as I recall.

Q. What specifically did he authorize you to do? A. He didn't put any limit on it.

Q. Now, you stated at one point that company counsel advised you that the leases must be on production by 1958 or they may be lost; is that a correct paraphrase of your testimony? A. They may be in jeopardy, yes.

Q. They may be in jeopardy. But all that you know about [92] that, then, would be the advice the company counsel has given you? You are not a lawyer, I take it, you would not be able to pass on that? A. If you want to put it that way, I will go along with you. However, in most of these instances the answers we get back from the Legal Department come from questions that are derived or generated in our particular section.

Q. The question— A. Not in all instances.

Q. The question might generate from your department, but the answer would not? A. That is correct. We are advised by them.

Q. What responsibility did you have in connection with the negotiation of the contract between Continental and Tennessee Gas Transmission Company which has been marked as Item "A"? A. The responsibility I had in that instance was a joint one with the Legal Department, in that we advised our Production Department and our management that these leases might be in jeopardy during the year, or by 1958 if they were not on production.

When it got into a situation where we wished to take steps to ensure production by 1958, my responsibility was to develop the leases that would be in the category of jeopardized. That was my responsibility, and we carried

on through with the various information needed on the type of lease, and that sort [93] of thing.

Anything relating to the lease we supplied them with. It was our primary concern to get those leases on production.

Q. You felt that you were under pressure because of the advice counsel had given to you, to get them on by 1958; is that correct A. That is quite correct.

Q. But you have no responsibility for entering into gas sales contracts? A. That is outside of the province of the Land Department, that is correct.

Q. Do you know who in the company has that responsibility? A. In this particular instance the man who negotiated this contract was Mr. Harold E. Vaughn; at that time he was Superintendent of Natural Gasoline Operations. He is no longer with the company. The natural gasoline people would be the ones.

Q. The natural gas? A. Natural gas, I believe that is correct; isn't it? The title. Gasoline and gas.

Q. In any event, it would be some other department? A. That is correct.

Q. So that it would be your responsibility to tell the Natural Gas Department that such and such gas ought to be sold and that terminated the interest of your particular department? [94] A. No, it didn't.

Q. Well,— A. We would tell them that it should be sold, but our responsibility didn't cease when we told them that. It was our responsibility to keep after them to see what we were going to do with them.

Q. Your responsibility, then, was to make sure that they followed through? A. Exactly.

Q. But you didn't do the following through? A. No, it wasn't my responsibility to see what they were going to do. It was to see that they did something.

Q. I take it that you had no responsibility for the particular wording of any of the contract provisions; is that correct? A. That is correct.

Q. And that your principal interest in the contract would relate to dates, as to when people are required to go ahead? A. That would be our principal interest.

Q. Now, sir, I believe that in response to a question from your own counsel you stated that if satisfactory certificates are issued, Continental would be ready, willing and able to perform. Who in the company is to determine whether or not a certificate is satisfactory? [95] A. That would be a joint effort. And it would be a management decision.

Q. Would it be your responsibility? A. No, it would not.

Q. Would it be the responsibility of your department? A. No, it would not.

Q. Which department would it be the responsibility of? A. Again it would be a management decision. No particular department.

Q. I take it, then, advice might be received from several departments? A. Yes, including ours.

Q. Including yours? A. Yes.

Q. Would your advice pertain to anything other than time? A. No.

Q. Now, I believe Mr. Kirby may have interrogated you about this, but my notes are not as complete as they might be. Insofar as your statement that the company will be ready, willing and able to perform upon

issuance of a satisfactory certificate, that statement is based on information you have received from others in the company, rather than from something that is the responsibility of your department? A. My response to the question was based on my knowledge of what the company is able to do from a financial point of [96] view. Whatever the recommendation would happen to be of the Operating Department, there wouldn't be any question in my mind, it would seem, on the basis of what we have financially to carry out whatever that recommendation might be. That was the basis for my response.

Q. You know the company has got a lot of money, in other words? A. I hope they do.

Q. And insofar as you stated that was also true of the other three applicants, that was based on your understanding that those three companies each have a lot of money? A. Yes, they have considerable money, yes.

Q. Do your duties also cover the West Delta area? A. Yes.

Q. Are you familiar with Section 3-J of the contract? There were some questions about that earlier. A. You mean the 50,000 from West Delta business?

Q. Yes.

Do you know whether, if Continental should deliver under this provision gas from the West Delta area, pursuant to Section 3-J, what the price charged would be, whether it would be the price under this contract or under the West Delta contract?

Mr. Ryan: May I have that question read back?

The Witness: I would like it also.

Presiding Examiner: Very well.

[97] (Question read.)

Mr. Voight: If Your Honor please, we have to object to that question, because a simple reading of this one sentence by counsel will show that there is no provision whatsoever for delivering gas from the West Delta area under this particular section.

Presiding Examiner: He doesn't mean it that way.

You don't understand the question to mean that, do you?

The Witness: No, I don't. I don't understand what is in here—

Presiding Examiner: You answer and state on what basis you are answering.

The Witness: As I understand you—now correct me—

Mr. Simons: Perhaps I misstated what this says.

The Witness: I am not quite sure I understand what you are leading up to, that is my problem.

By Mr. Simons:

Q. Counsel stated that a simple reading of this—

Presiding Examiner: Just state your question.

Mr. Simons: I am having some difficulty, so I will turn either to counsel or to the witness and ask this question:

By Mr. Simons:

Q. Could you explain to me what 3-J means, how that would operate? Perhaps I can get back to my other question after that. [98] A. Three-J, as I understand it, you are getting into the technical phase of the contract, itself.

and as far as I am concerned, the contract stands on itself. However, as I understand it, it is a protective clause which would relate primarily to the Tennessee—it might be, Mr. Witmer could shed a little more light on that than I.

Q. Let me phrase it this way: If this provision provides that Continental may deliver gas from the reserves that are involved in this present proceeding to Tennessee in place of gas which it would otherwise deliver from the reserves involved in the West Delta area, if that is what the provision means, do you know what price would be charged? Would it be the price here or the price in the West Delta?

Mr. Voight: If Your Honor please, we object to that question, it is based upon a supposition which is contrary to fact. If this provision means something, then what will happen? This provision doesn't say that it is delivering gas instead of; it says that if it is prevented from delivering gas under another contract, Tennessee can get the gas from this area.

Mr. Simons: I will accept counsel's interpretation of this for the purpose of this question, and my question would then be: If Tennessee does take that gas, what price do they pay?

The Witness: I would assume if it came from this here, they would pay the price called for under this contract. That is an assumption on my part.

[99] By Mr. Simons:

Q. Now, would you turn to Section 6-B? This was the question about which Mr. Ryan interrogated you earlier. A. 6-D was that?

Q. 6-B. If you don't know the answer, I certainly would accept that as a response. Does this provision mean that the ten per cent reduction in gas would occur after it is metered, after the point of delivery? A. Again, you are getting into the technical phase of the contract and I would prefer to let the contract speak for itself. I am not prepared to answer that one, I say, I don't know.

Q. Sometimes when a contract speaks for itself, it doesn't speak very clearly. A. That is a verity.

Presiding Examiner: All right.

By Mr. Simons:

Q. I take it, then, that your answer is that you don't know? A. I would rather refer to the contract, that is a technical question.

Q. I believe you stated that Continental is the operator with respect to the contracts involved here and the leases involved here. Has that been true ever since the leases were first granted or obtained? [100] A. Correct. They haven't been operating agreements, in effect, but in effect, Continental has been the operator for the C.A.T.C. companies.

Q. Is that as a result of an agreement between the four companies, rather than as a provision of the lease? A. That is a result of an agreement between the four companies.

Q. But there is nothing in the lease, itself? A. In the lease, no, it doesn't say that.

Mr. Simons: I think that is all I have, Mr. Examiner.

Presiding Examiner: Staff Counsel?

Mr. Geneau: Yes, Mr. Examiner.

By Mr. Geneau:

Q. Mr. McKinley, the application of Continental in the instant case refers to the contract between Tennessee and Continental, which it Item "A", as the contract dated August 17, 1956, as amended. Have there been any amendments to this Item "A"? A. There have been some letters of interpretation and some contingency letters, but I wouldn't say there are any letters that would relate to price or any such matter as that.

[101] Q. In other words, Item A represents the complete contract and the only contract in existence between the parties concerning this particular gas? A. If you would interpret the letters as being contracts, I would say no. However, if you do not, I would say yes; that is correct.

Q. Are the letters contracts or amendments to this contract? A. No, I wouldn't—as I say, they are contingent propositions, or they are interpretive propositions, but they do not amend it in the sense that they change the terms of this agreement. At least, that is my reading of them.

Q. They don't change the terms in any manner whatsoever, then? A. Insofar as price is concerned, and other matters, as I read them, they are not, they are interpretations of what is in the contract or contingency letters.

Q. What sort of matters do these letter negotiations go into? A. I have a note here.

There is a contingency letter which involves favored nations and redetermine clauses, in the event it is determined that this group does not have jurisdiction.

There is a letter interpreting the phrase "liquid hydrocarbons," and there is a transportation letter which relates [102] to production in excess of two trillion. And there is a tax letter which is an interpretive letter on our tax portion of this contract. There is a pipe agreement which is a seller's opinion, and it is again a contingency letter.

Does that answer your question?

Q. Yes, it does, Mr. McKinley.

I wonder how we could obtain copies of those? They seem to be rather relevant to the contract: As a matter of fact, they just might clear it up beautifully and do away with all ambiguities.

Mr. Voight: If your Honor please, I don't believe the witness made clear that the contingency of that favored nations is that if this is not subject to the jurisdiction of the Federal Power Commission then another provision shall apply. There is no question here of the sale being under the jurisdiction of the Federal Power Commission. That contingency cannot apply as long as it is subject to the Federal Power Commission. So it cannot be material in this particular matter.

Mr. Geneau: If that particular letter so says that I would be tempted to agree with you.

Mr. Voight: That is what he meant by—he said contingent on jurisdiction, or something like that. He was speaking so low I am not sure whether you got the answer.

The Witness: Can you hear me?

Mr. Geneau: But we are still desirous of seeing them, Mr. [103] McKinley. You mentioned a letter concerning hydrocarbons. Now, there is very definitely a provision in here dealing with the transportation of—

Presiding Examiner: He wants to know if he can see them. Have you got them?

The Witness: They are available; I have.

Mr. Woodfin: Of course he can.

Are copies of those amendments going to be made available to other parties in this proceeding?

Mr. Voight: They are not amendments. They are supplemental letters.

Mr. Ryan: Your Honor, I would like to see those, if we may.

Presiding Examiner: When your time comes for further cross-examination you may ask to see them.

Mr. Ryan: Are we off the record, Mr. Examiner?

Mr. Voight: I think so.

Presiding Examiner: Staff counsel is examining the letters. How much time do you expect to take, counsel?

Mr. Geneau: Could we have five or ten minutes, Mr. Examiner?

Presiding Examiner: The hearing is recessed for five minutes.

(Whereupon, at 2:45 p. m., a recess was taken until 2:50 p. m. of the same day.)

[104] Presiding Examiner: The hearing will be in order.

Mr. Geneau: Mr. Examiner, staff would like to

have these copies of these supplemental amendments—not amendments, instruments—made a part of the record in this proceeding. They are explanatory of many phases of the contract involved.

Presiding Examiner: Can any of them be eliminated on the contingency basis?

Mr. Geneau: No, Mr. Examiner, we think not.

Presiding Examiner: How many pages to each one?

Mr. Geneau: Some are very short, Mr. Examiner.

Presiding Examiner: Do you have any diagrams? I was thinking of having the reporter set them out in the transcript.

Mr. Geneau: I think there is one diagram attached.

Mr. Voight: There are ten pages involved plus one diagram.

Presiding Examiner: Isn't the diagram the same as Exhibit 1? Is the diagram that is attached to one of the documents the same as Exhibit 1?

Mr. Voight: It includes—yes, it is the same as Exhibit 1.

The Witness: It is the same in that it covers the same area.

Mr. Voight: It covers the off-shore area.

Presiding Examiner: Does it show anything that Exhibit 1 doesn't show?

[105] The Witness: Yes, it does.

Presiding Examiner: Is it essential?

Mr. Voight: Yes, it is.

Presiding Examiner: Is the line referred to in the document? Does it add anything to the operative terms of the letter?

Mr. Voight: If Your Honor please, could we have copies of the diagram made and have the letters copied into the record?

Presiding Examiner: That would add a little confusion.

Do you have any objection to staff counsel's proposal that these documents be included in the record?

Mr. Foster: Mr. Examiner, if I may offer a suggestion: In the first place, we will be quite happy to have them made available for inspection or alternatively to be made a part of the record in the proceeding. We had not viewed them as essential parts of the application; therefore, they were not heretofore attached.

Adopting and pursuing the suggestion, which I gather Your Honor was pointing toward a moment ago, I would like to offer the suggestion that so far as these documents are in narrative form they be spread upon the transcript, and insofar as the attachment with respect to one of these documents is concerned that it be examined by anyone who is interested here, now, and if deemed to be necessary or desired by any party we can thereafter have it reproduced and made available as a part of the record, or separately for information.

[106] Mr. Woodfill: We concur in that, Mr. Examiner.

Mr. Voight: If Your Honor please, four of the supplemental letters, which consist of seven pages, have no diagram or anything attached, and can certainly be spread on the record.

Presiding Examiner: Any objection?

Mr. Geneau: No.

Presiding Examiner: Counsel for any intervenor?

Mr. Ryan: We haven't seen the documents, Your Honor.

Presiding Examiner: You may see them.

Are you ready?

Mr. Simons: Yes, sir.

Might I inquire whether there are comparable letters between Tennessee and the other three applicants herein? All of these seem to be to Continental Oil.

Mr. Foster: It is my understanding, Mr. Examiner, that the copies are identical in every case and there are such similar agreements.

Presiding Examiner: Counsel?

Mr. Woodfin: That is correct, sir.

Presiding Examiner: All right.

Mr. Simons: I would have no particular objection to these documents being copied into the record. I think it might be somewhat better if they were—if copies were prepared up and sent to the parties, but I wouldn't object to it being done the other way.

[107] Presiding Examiner: The reporter may copy the documents handed him by counsel for the applicant, produced in compliance with staff counsel's request at this point, except for the diagram attached to one of the documents.

(The documents referred to are as follows:)

TENNESSEE GAS TRANSMISSION COMPANY

P. O. Box 2511

HOUSTON 1, TEXAS

August 17, 1956

Please address your
Reply to Attention of:
Wm. W. Witmer

Continental Oil Company
P. O. Box 2197
Houston, Texas

Gentlemen:

Tennessee Gas Transmission Company, as Buyer (hereinafter called "Tennessee") and Continental Oil Company, as Seller, (hereinafter called "Continental"), are concurrently executing of even date herewith a gas purchase and sales agreement (hereinafter called the "contract"), covering the purchase and sale of gas from reserves dedicated under said contract, which reserves are located in the East Cameron, West Cameron and Vermilion Areas in the Gulf of Mexico.

In the event it is determined by statute or by judicial process that the Federal Power Commission does not have [108] control over prices which producers such as Continental are allowed to charge for gas sold to gas transmission companies such as Tennessee during the term of the contract, or in the event the Federal Power Commission accepts and allows to go into effect rates which producers are allowed to charge for gas sold as a result of the operation of favored nations clauses and price redetermination clauses in gas purchase and sales agreements similar to the above mentioned contract, with respect to provisions

affecting price, quantity, quality and delivery, Tennessee agrees to amend said contract and add thereto a favored nations clause and price redetermination clause substantially similar to and like those contained in the gas purchase and sales agreement dated January 31, 1956, between Tennessee and Continental covering gas located in the West Delta Area, Gulf of Mexico. The area in which these clauses will be operative will be the area located South of the red line plotted on the official leasing maps attached hereto. However, if during the term of said contract the boundary dispute relating to title to the submerged lands located off shore of the State of Louisiana between the United States and the State of Louisiana is judicially determined or settled, Buyer and Seller agree that effective as of the date said boundary dispute is so determined, the favored nations and redetermination clauses referred to immediately above will be operative in the areas located South of the most Southerly boundary line [109] of the State of Louisiana so determined. The redetermination clause will be based upon the pricing periods contained in Section 10 of the contract.

Yours very truly,

TENNESSEE GAS TRANSMISSION COMPANY

By /s/ Wm. W. Witmer
Vice President

Agreed to and Accepted this
17th day of August, 1956

CONTINENTAL OIL COMPANY

By /s/ O. L. FISHER
O. L. Fisher

Initialed by: HEV GW SVM MSK

This is a copy

CONTINENTAL OIL COMPANY

P. O. Box 2197

February 8, 1957

Tennessee Gas Transmission Company
P. O. Box 2511
Houston 1, Texas

Attention: Mr. W. W. Witmer

Subject: Pipe Transfer Agreement Between Tennessee and Continental-East Cameron, West Cameron and Vermillion Areas

Gentlemen:

With reference to the subject letter agreement, dated August 20, 1956, between Tennessee Gas Transmission Company and [110] Continental Oil Company, item 2 provides that "Tennessee will deliver to Continental, as operator of the leases owned by the parties named above, at Continental's option, its plans and specifications for a pipeline or pipelines to take gas pursuant to the above referred to contract in the event satisfactory certificates have not been issued by February 1, 1957, together with information regarding its rights of way, easements and permits to construct such lines. Any construction agreements or proposals will also be made available for the information of Continental."

Please be advised that Continental requests the information provided for in item 2, as set out above.

Yours very truly,

CONTINENTAL OIL COMPANY

By

cc: Mr. O. L. Fisher, Continental Oil Company
Mr. E. B. Miller, Jr., Tidewater Oil Company
Mr. C. F. Sharp, The Atlantic Refining Company
Mr. J. A. Cleverley, Cities Service Production Company

August 20, 1956

WHEREAS, Tennessee Gas Transmission Company, hereinafter referred to as "Tennessee", has entered into an agreement with Continental Oil Company, hereinafter referred to as "Continental", dated August 17, 1956, for the purchase of gas produced from certain reservoirs in the East Cameron, West Cameron and [111] Vermilion Areas of the Gulf of Mexico; and,

WHEREAS, Section 2 of the agreement provides that the parties will file for required certificates and in the event satisfactory certificates have not been received by April 1, 1957, either party shall have the right to cancel the agreement; and,

WHEREAS, Continental will not require a pipeline connection if satisfactory certificates are obtained by the parties as provided in Section 2, and with the approval of its Co-lessees, as evidenced by their joinder herein, desires to transfer its rights in and to the steel ordered for a pipeline or pipelines from the dedicated reservoirs to shore; and,

WHEREAS, Tennessee agrees to transfer pipe, fittings, valves, and connections to Continental if at a subsequent date, as herein provided, the satisfactory certificates have not been granted.

NOW THEREFORE, in consideration of the premises it is agreed that:

1. Continental, as Operator of the leases owned by Continental, the Atlantic Refining Company, Tidewater Oil Company and Cities Service Production Company, does by this act transfer and assign all of its rights in and to the steel ordered for pipelines to serve reserves dedicated to Tennessee. Tennessee shall pay the supplier for such steel as delivered.

2. Tennessee will deliver to Continental, as Operator of [112] leases owned by the parties named above, at Continental's option, its plans and specifications for a pipeline or pipelines to take gas pursuant to the above referred to contract in the event satisfactory certificates have not been issued by February 1, 1957, together with information regarding its rights of way, easements, and permits to construct such lines. Any construction agreements or proposals will also be made available for the information of Continental.

3. In the event satisfactory certificates have not been issued by April 1, 1957, Tennessee will deliver to Continental, as Operator, at Continental's option, to be exercised at any time after April 1, 1957, but before January 1, 1958, sufficient steel pipe, fittings, valves, and connections to construct the pipeline or pipelines pursuant to the said plans and specifications (Item 2) from such delivery point to shore.

4. In addition to pipe and connections set out in Item 3 above, Tennessee will, at Continental's option, to be exercised any time after April 1, 1957, but before January 1, 1958, deliver to Continental, as Operator, sufficient pipe, fittings, valves, and connections to connect the shore terminus, which may be built with pipe provided under Item 3, with the plant of Continental or Cities Service Refining Corporation in Lake Charles, Louisiana.

5. At the time, and from time to time, as the pipe and connections are delivered, a complete statement of cost will be [113] presented to Continental with billing by Tennessee for such pipe and connections.

6. In the event the gas sales and purchase agreement hereinabove referred to is not terminated prior to the time satisfactory certificates have been obtained by the parties hereto, and Continental, as Operator of leases, or all lessees, or their designated representatives, has constructed a pipeline in accordance with the plans and specifications of Tennessee, or any part of such line, using in the construction of such a line the pipe and connections acquired from Tennessee pursuant to Item 3, then and in that event the party, or parties, constructing and owning such line will convey to Tennessee, at cost, all of its right, title and interest in and to such line; including its rights in any right of way or easement it may have the right to convey.

7. In the event Continental exercises the rights herein granted by Tennessee under Items 3 and 4, in whole or in part, it is agreed that the gas purchase agreement between Tennessee and Continental will not be terminated by failure of a party to secure satisfactory certificates prior to January 1, 1958.

The Atlantic Refining Company, Tidewater Oil Company, and Cities Service Production Company join herein for the purpose of evidencing their agreement to the commitments of Continental, as Operator of leases owned by the parties and further agree that any agreement between any of them and Tennessee for the [114] sale and purchase of gas from properties to be served by the line which "Continental" may construct under Item 3 will not be terminated prior to January 1, 1958, if Continental exercises its option.

CONTINENTAL OIL COMPANY

By O. L. Fisher

TENNESSEE GAS TRANSMISSION COMPANY

By Wm. W. Witmer

Initialed by: HEV GW SVM MSK

APPROVED:

THE ATLANTIC REFINING COMPANY

By: J. N. Mendenhall,
General Manager of
Domestic Crude Oil Production

TIDEWATER OIL COMPANY

By Lloyd Armstrong
Assistant Division General Manager

CITIES SERVICE PRODUCTION COMPANY

By C. Keuier
Manager, Natural Gas Division

[115] TENNESSEE GAS TRANSMISSION COMPANY

P. O. Box 2511

Houston 1, Texas

August 17, 1956

Please address your
reply to Attention of:
Wm. W. Witmer

Continental Oil Company
P. O. Box 2197
Houston, Texas

Gentlemen:

Tennessee Gas Transmission Company, as Buyer, and Continental Oil Company, as Seller, are concurrently executing a gas purchase and sales agreement (hereinafter called the "contract") of even date herewith, covering Continental's interest in leases and natural gas dedicated thereto, such leases and gas being located in the Vermilion, East Cameron and West Cameron Areas in the Gulf of Mexico.

In Section 10, the contract provides that "Buyer shall reimburse Seller the amounts for which Seller is liable and pays to the State of Louisiana or Federal Government applicable or equivalent to the gathering tax imposed by Act No. 11, Louisiana Laws of 1948, as amended by Act No. 45, Louisiana Laws of 1954, in respect of or applicable to gas delivered hereunder. . . ."

Under the contract the total monetary consideration to pass [116] from Buyer to Seller for all gas delivered

thereunder is to be the purchase price, as determined by the applicable provisions of Section 10, plus the amount, if any, of reimbursements for taxes other than the Louisiana gas gathering tax at the present rate, plus one cent (1¢) per MCF, measured at 15.025 p.s.i.a., payable by Buyer to Seller under the provision quoted above.

The parties hereto realize that certain of the leases dedicated to the contract are so located that the lands covered by such leases may be claimed both by the State of Louisiana and the Federal Government and, therefore, such parties agree as follows: As long as the lands located in the disputed area which are covered by leases dedicated to the contract are considered to be federal domain, the one cent (1¢) referred to above, insofar as such lands are concerned, shall be paid by buyer to seller under the 1¢ as a payment equivalent to or equal to the Louisiana gas gathering tax. In the event any or all of the lands so located are finally determined, during the term of the contract as such term may be extended, to be State of Louisiana domain, the payment of the one cent (1¢) referred to above both prior to and after such determination will be considered to be reimbursement by Buyer to Seller of the gas gathering tax imposed by the State of Louisiana. In this connection, Seller will indemnify and hold Buyer harmless against claims of the State of Louisiana under Act No. 11, Louisiana Laws of 1948, as amended by Act. No. 45, Louisiana Laws of 1954, for amounts past due or to become due applicable [117] to

gas delivered to Buyer by Seller under and according to the terms and provisions of the contract.

Very truly yours,

TENNESSEE GAS TRANSMISSION COMPANY
By /s/ Wm. W. Witmer
Vice President

Agreed to and Accepted this
17th day of August, 1956

CONTINENTAL OIL COMPANY
By /s/ O. L. Fisher

Initialed by: HEV GW SVM MSK

This is a copy

TENNESSEE GAS TRANSMISSION COMPANY

P. O. Box 2511
HOUSTON 1, TEXAS

August 17, 1956

Please address your
reply to Attention of:
Wm. W. Witmer

Continental Oil Company
P. O. Box 2197
Houston, Texas

Gentlemen:

Tennessee Gas Transmission Company, as Buyer and Continental Oil Company, as Seller, are concurrently exe-

cuting of even date herewith a gas purchase and sales agreement (herein-[118]after called the "contract"), covering the purchase and sale of gas from reserves dedicated under said contract, which reserves are located in the East Cameron, West Cameron and Vermilion Areas in the Gulf of Mexico.

Under paragraph 6(c) of said contract Buyer has agreed to transport liquefiable hydrocarbons for Continental Oil Company. The term liquefiable hydrocarbons, as used in said agreement, shall include condensate and distillate which have been or which may be separated from gas.

Yours very truly,

TENNESSEE GAS TRANSMISSION COMPANY
By /s/ Wm. W. Witmer
Vice President

Agreed to and Accepted this
17th day of August, 1956

CONTINENTAL OIL COMPANY
By /s/ O. L. Fisher

Initialed by HEV GW SVA MSK

This is a copy

Presiding Examiner: Counsel, do you need that diagram?

Mr. Geneau: Staff does not need it, Mr. Examiner.

Presiding Examiner: Very well.

The fact that you haven't objected makes it a situation where I don't have to make a ruling as to relevancy, counsel.

Are there further questions?

[119] Mr. Geneau: Yes.

By Mr. Geneau:

Q. Mr. McKinley, if I could direct your attention to part 2 of Exhibit A of Item A, wherein you have set out the sand intervals measured by the electric log, opposite the various wells perforating those sands, am I correct in stating that the numerical designation used in connection with the well applies to the block number which appears on Exhibit No. 1? For example, well 192-B-1 would be a well B-1 located in Block 192 as shown on Exhibit No. 1? A. That is correct. That is that would be a bottom hole location.

Q. Sure. A. It could be a directionally drilled well, that is my point.

Q. Yes. A. All right.

Q. Now, in that list of well numbers I note that there appears two wells designated 66—I should say one well designated 66-A2, apparently having, I believe, two different sands. A. That is correct.

Q. Now, reading the well number in connection with part 1 of this exhibit, I note that no land or leases are dedicated to the performance of this contract from— A. Sixty-six.

[120] Q. Yes. A. That is correct.

Q. In one of the other maps that has been submitted as a part of the application, not of Continental but of one of the applicants in this proceeding, a small square is shown

covering blocks — A. Sixty-two, Sixty-three, Sixty-seven, and Sixty-six.

Q. That is correct. And that also shows up on the Exhibit No. 2, which was sponsored, I believe, by Mr. Vaughn. The matter that I would like to have cleared up, Mr. McKinley, is: What sort of an agreement is involved concerning that small sectional square which appears in Exhibit No. 2 on the map, Block 62 field, D-3, 6310 Miocene sand? A. I haven't got that exhibit, but I know what you are talking about.

The agreement that exists on that property—and, incidentally, it is 168 acres out of each one of those four blocks—is the agreement between Atlantic, Tidewater Oil Company, Cities Service Production Company, and Magnolia Production Company, and Newmont Oil Company. It relates to the development of that 640 acres. It does not in any way change the ownership of the leases. It is really merely as to production from the leases.

Q. In other words, am I correct in saying, Mr. McKinley, that no lease from Block 66 is dedicated to the performance of [121] Item A? A. No lease?

Q. That is right, no lease. A. Yes.

Q. And as concerning the gas that is produced from there, that is shared 75-25 between CATC and between MCN? A. Correct.

Q. And MCN takes its share of gas which is not disposed of by Continental under this contract? A. That is right. They have the right to do what they wish with whatever they have in that particular area under the contract, they certainly do.

Q. In other words, Continental will be selling its interest in that well in section 66 under this contract? A. Correct.

Q. Its three-quarters— A. Its proportionate share of the three-quarters; that is correct.

Q. Have you any idea what MCN will do with its 25 percent of the share of the production from 66? A. I would be guessing on that score, but as MCN is composed of Magnolia, Continental Oil Company, and Newmont Oil Company, I know what one of them would do. What Newmont Oil Company would do I wouldn't know their position on the marketing of gas. There is no other market in the area that I know [122] of. What their decision would be, I really don't know.

Q. Directing your attention to Exhibit No. 1, Mr. McKinley, and in connection with your former testimony, I believe you said that there were nine platforms in existence at this time with the possibility of two more, which might be constructed. A. Yes.

Q. I wonder if you could locate those platforms for me on Exhibit No. 2? A. You are talking, by Exhibit No. 1, about this map?

Q. Yes. A. I know of the existence of the location of one, it would probably be in that block 71, East Cameron area. I don't recall where the other one would be directly. I have a proposed location sheet here, I don't know the exact location—the first one, as I say that I have any knowledge of, the exact location of it I am not sure of, but it would be in the Block 71 field, as I understand it. Where the second one is again I must say I don't recall offhand where it would be.

Q. That is as to the two proposed ones; is that correct? A. That is correct.

Q. What about the nine existing ones? A. The nine existing ones? Sorry, I didn't catch that. I can point

those out to you from the map I have here. Do you [123] want me to come down there, or do you want to come up here, or how do you want to do this?

Q. You can tell me by block numbers. A. All right. One down in the southwest corner of Block 192. One in the southeast corner of 192. There is one in approximately the center of the south line of 192. There is one in the southeast quarter of the northeast quarter of block 193. There is one in the southwest corner of Block 62. There is one in block 49 down in the southerly portion. I would say it was in the southwest quarter of the southeast quarter of block 49. There is one in the southwest quarter of block 51. There is one in block 71. There is one in the northeast quarter of the northeast quarter of block 96, Vermilion. Does that add up to nine?

Presiding Examiner: Yes.

By Mr. Geneau:

Q. Could you tell me just what would be located on each of these platforms, Mr. McKinley? Or what is located on these platforms? A. What is located on the—

Q. The existing platforms. A. Of course on the platforms—I mean I can give you a generalized description of it. I don't pretend to describe it in the manner that you would get it from the production department. A generalized description of that platform would be [124] this: That it is a leveled area with your wellhead on the platform and exposed. There is a drilling well on it, you will have your rig on it, your derrick, and tie up with the tender. Most of these are tender locations. Some of them have been drilled by mobile units, but, of course, where there are platforms that would be the situation, normally speaking.

Is that too generalized for you? Is that what you want? There are no producing facilities on there, if that is what you are getting at.

Q. Are there any separators on these platforms? A. Not at the present time.

Q. Will there be? A. My understanding from our engineering department is that they have pretty well or almost finalized their program on how they will set up their producing facilities on the platforms. As I understand it, there will be separators on the platforms.

Q. On each platform? A. Those that are producing.

Q. Will there be meters on each platform, also? A. That is right.

Q. Is it your understanding that Tennessee will be required to build a line to each one of these nine platforms, plus the two potentials? A. Assuming that each one of them is producing and in [125] this instance they are all producing, they will, yes.

Q. In other words, there will not be one— A. One gathering station.

Q. —one centralized gathering platform, or one centralized gathering platform on which a separator is located? A. No, they will come right to the platform, the delivery point will be at the platform.

Q. Now, Continental will construct any lines—will any of these platforms be interconnected? A. I frankly don't know, but I don't believe they will. I think they will be separate entities, and—in other words, you are thinking of a gathering system within the field?

Q. That is correct. A. It is my understanding there will not be a gathering system in these fields.

Q. So that except, if you will, for the pipe, for the

drill stem coming up with the Christmas tree on the top, except for that pipe there will practically be no pipe of Continental's involved? A. Other than what is necessary to make the connections and that sort of thing when it gets around, plus the producing facilities, separators, water knockouts, and what have you, that they might put on the platforms. At the present time they are not there, if that is what you are really getting at.

Q. Let me ask you one other question along that line. [126] Mr. McKinley: You say that 22 wells have been drilled and if there are some nine platforms does that mean roughly there would be, we may say, two wells per platform? A. No, that would be misleading, actually. There have been some—there have been four dry holes out there, and in some instances I think we are up to the No. five wells on one platform. So it may average out at that, but if I stated that there were two per platform it would be misleading. In some cases there are as many as five.

Q. One other clarifying question there, Mr. McKinley: I understand that some of the wells are drilled off on a diagonal, and some of the wells are dually completed. Can dually completed wells be drilled off and on a diagonal, or must they necessarily be straight wells? A. You are asking me a technical question, but I can take a look at my completion report, and, as I understand it, there are directionally drilled wells that are on a dually completed basis now.

Q. What is your understanding, Mr. McKinley, of the type of gas that Continental and the other three producers are producing from these various leases? A. You mean are going to produce from these leases?

Q. Yes. A. I wouldn't attempt to define the type of gas. All I could say is that it is dry gas, far as I know.

[127] Q. Dry gas? A. I don't want to—I couldn't make a definition that would be worthwhile for your record.

Q. Well, heretofore I think the word "non-associated" has been used. What is your understanding of that? A. You have got me in a technical question, and it is, frankly, outside of my province, I wouldn't want to venture a definition of non-associated. I am not dodging your question, understand, I just wouldn't wish to put one forth.

Q. Could you tell me, Mr. McKinley, why the contract defines gas to mean gas well gas, residue gas after processing, as well as casinghead gas produced with crude oil, if this gas is all dry gas out there? A. Now you have got me back on what I said earlier. You are getting me into technical aspects of it, Mr. Geneau, and if the contract doesn't spell it out I am afraid I couldn't add very much more to it.

Mr. Woodfin: Mr. Examiner, from the standpoint of the record I would like to point out that in some 95,000 acres dedicated under this contract, which acreage is only partially developed at this time, and practically any type of gas may be found there, and I presume that the parties would desire to cover the eventuality to take care of the completed dedication. I think that is already on the record, but I don't want it to appear that this contract was written to cover just the dry [128] gas that has been discovered now. Because future development may discover associated gas.

By Mr. Geneau:

Q. In that connection, Mr. McKinley, let me ask you: Just what is being dedicated under this contract? Any and everything that might be discovered under these leases that are set out in Exhibit A to Item A, part 1? A. If I were to answer that question I would be merely repeating to you what it says in the contract, Mr. Geneau—I can do that if you wish—that our dedication covers the following.

Q. I believe this question has been touched on earlier, Mr. McKinley: Directing your attention to page 3 of Item A, the contract, that is section 3-A-2-ii, I believe, that sentence reading "From November 1, 1958, and during the remainder of the term hereof as such term may be extended hereby, a quantity equal to 1,000 Mcf for each 8 million Mcf of recoverable gas originally in place in the dedicated reserves."

Is it your understanding that by dedicated reserves only those dedicated reserves are included which are listed in Exhibit A to Item A hereof?

Mr. Foster: Mr. Examiner, I would like to suggest that there are portions of pages 7 through 10 of the contract devoted to spelling out the basis for an understanding of the point that counsel is trying to get at, and it would seem to me, [129] far more in order to simply look at the terms of the contract rather than have the witness try to summarize in a sentence what appears on several pages.

Presiding Examiner: The witness may answer.

The Witness: Would you repeat your question, Mr. Geneau?

Presiding Examiner: Mr. Reporter, please read the question.

(The question was read.)

Presiding Examiner: I recall from your prior testimony you said you had nothing to do with the negotiation of this contract.

The Witness: That is correct.

Presiding Examiner: But I think you also said that in connection with your duties in your department that you had to, in effect, to use my language, survey the disposition of the gas?

The Witness: Survey it in the sense as to how it would affect the lease itself. In other words, one, is there production from the lease, or, second, is there not? The answer to that question, whether it be negative or affirmative, concerns me.

Presiding Examiner: Answer that question, if you can, in the light of that.

The Witness: If I understand this correctly, what you are saying is that the intervals that are spelled out in this dedication are they limited to that only; is that correct? Or [130] am I misreading you altogether?

By Mr. Geneau:

Q. Are they limited to two, three, or four million? A. Well, they are limited to this insofar as this is our initial dedication, if that is what you are getting at.

Mr. Woodfin: Mr. Examiner, might I interrupt in the interest of brevity here? I can't see anything on earth controversial about this matter. If staff counsel will tell us what he is trying to ascertain

we might be willing to stipulate it. The contract speaks for itself, there is two trillion feet of gas dedicated at this time from these reservoirs underneath the 95,000 acres.

Mr. Kirby: Could we ask where that appears, where counsel is referring to?

Mr. Woodfin: Of course, it appears in the contract.

The Witness: It appears—I could have answered that easily—

Presiding Examiner: Let us not get into a discussion in which everyone takes part. Counsel, aren't you asking how much more could be dedicated under that contract?

Mr. Geneau: Well, the way they have the contract divided—

Presiding Examiner: I don't want to get into any more detail. But isn't that what you were asking?

Mr. Geneau: Well, they have made provision in this contract for the dedication of additional reserves. With that [171] particular part I am not concerned at the moment. I am merely concerned with how much of the gas which is dedicated now, how much of the gas is dedicated now, period. Whether or not they ever add any more or dedicate any more additional acreage, I haven't gotten into that.

Presiding Examiner: I understood you until you put in the word "acreage."

Mr. Geneau: Leases.

Presiding Examiner: Well, all right. Are you willing to stipulate as to that?

Mr. Woodfin: I have already stated on the record what is dedicated up to this time, from the 95,000 acres and the reservoirs which appear upon section 2 of Exhibit A to the contract; under the entire 95,000 acres up to two trillion feet of gas is dedicated presently under the contract from those reservoirs. If two trillion five is found in those reservoirs, that five is not dedicated at this time. Plus the depth limitation on Vermilion, which appears on this page. But there is two trillion feet of gas dedicated from all those reservoirs. If those reservoirs under the 95,000 acres will produce 10 trillion feet, they still have only two trillion feet. If they only produce two trillion feet, then they have got every bit of it.

By Mr. Geneau:

Q. Mr. McKinley, you are also, I believe, the policy [132] witnesses for the applicants. I direct your attention to page 11 of Item A, section 8-B and C, which deals with the establishment of separators, and the transportation of liquid hydrocarbons, or liquefiable hydrocarbons. Is it your understanding of these sections that the liquefiable hydrocarbons are the ultimate property of the applicants in this particular under this particular contract? A. Did you say ultimate property?

Q. Yes. That until such time as Continental exerts an option to take or extract the liquefiable hydrocarbons they belong to Tennessee, but if, as, and when you do exert such an option then they become yours? A. That would be my understanding.

Q. And that at such time Tennessee, or at such time you exerted such an option, Tennessee would be required to transport these liquefiable hydrocarbons for Continental at no charge? A. That they would transport the liquefiable hydrocarbons I can testify to, yes. As to the charge, I don't recall offhand. I don't think there is a charge involved. I don't recall a charge.

Q. What was your last? A. I don't recall a charge being spelled out. I don't believe there is one.

Mr. Woodfin: Mr. Examiner, I want to make one observation on the record at this point. I don't want to interrupt [133] any move, but I do have to take exception on behalf of Tidewater to the phraseology of counsel's questions with respect to the hydrocarbons, liquefiable hydrocarbons belonging to Tennessee until such time as we exercise our option. We have the right to extract the liquefiable hydrocarbons down to a thousand Btu; if we do not elect to exercise that right then Tennessee gets a little richer gas, but it doesn't own something and then we take it back away from them under option. I don't want the record to reflect that phraseology.

By Mr. Geneau:

Q. To your knowledge, Mr. McKinley, has the Tennessee Gas Transmission Company filed or are they going to file an application with this Commission for authorization to transport liquefiable hydrocarbons? A. I know nothing of that matter.

[134] Q. As the policy witness of Continental, what are the plans of Continental in connection with this extraction?

A. Again, as I have said before, it is my understanding that our Engineering Department has just about finalized what they are going to do with the production from these leases, and I don't believe there has been any currency, or that the report has gotten any currency, and I don't know the details of that report, as to how they are going to handle this particular matter.

Q. You have no idea whatsoever? A. I do not, I have no idea.

Presiding Examiner: Have you further questions?

Mr. Geneau: Yes, Mr. Examiner.

By Mr. Geneau:

Q. Mr. McKinley, as a policy witness of Continental, if at some future date Continental does establish ashore, a separation plant for the extraction of liquefiable hydrocarbons, and does extract and sell liquefiable hydrocarbons, would Continental be willing to accept, in this proceeding, a certificate conditioned upon that event, that a cost of transportation be paid to Tennessee for so transporting those hydrocarbons, or that in perhaps some future rate proceeding the costs be allocated between the costs of transporting the liquefiable hydrocarbons? A. You are asking me a question I don't believe anybody [135] would be able to answer right now. I am not dodging, again, as I say—I am not prepared and I don't think anyone else would be prepared upon receipt of that question to answer you right now. I am not, certainly.

Mr. Foster: In connection with that colloquy, Mr. Examiner, I would like to make this observation for-

Atlantic and for Cities Service: that the assumption underlying the question put to the witness is incorrect, that there is no charge for the transportation.

It appears to me that that necessarily is a part of the consideration for the overall transaction spelled out in the entire contract and his attempt to isolate that and assume that there is no consideration for that is not established and the assumption is not founded.

I think the record should be made clear on that point. And as to whether the applicants would be willing to accept some considerational certificate, in any respects, is a matter we can't consider in a vacuum.

Mr. Geneau: Might I ask Mr. Foster there, Mr. Examiner, whether or not then the price of gas to Tennessee must be higher than the 21.4 cents, if that is a part of the consideration? To the extent that we could put a value on the cost of transporting any liquefiable hydrocarbons, that would be an increased cost to Tennessee, would it not?

Mr. Foster: I don't think that there is a basis, as I [136] understand the contract, upon which you can isolate and arrive at any determination such as you are assuming.

Presiding Examiner: Very well.

By Mr. Geneau:

Q. Mr. McKinley, directing your attention to page ten of Item "A", Section 5, that provides—Part A provides that on or before the date of initial delivery of gas hereunder,

Buyer and Seller will endeavor to determine by agreement the total quantity of recoverable gas in place dedicated hereto as of the date of initial delivery hereunder.

Has that determination been made? A. I have no knowledge of it having been made. It may have been, but I have no knowledge of it.

Q. Directing your attention to page 8 of Item "A", Part B, provides, in effect, for an additional dedication, I guess you could call it, in this same area.

Presiding Examiner: What section is that?
Mr. Geneau: That is Part B.
Presiding Examiner: Of what?
Mr. Geneau: I am sorry, 4-B.

By Mr. Geneau:

Q. —that on or before August 1st of '57, additional gas reserves may be dedicated in these three areas. To your knowledge, has any gas reserves been so dedicated under B? A. To my knowledge, there has not been any.

[137] Q. And I believe Section C, following that, provides for an alternative dedication on or before August 1st, 1958. Has any been made under that? A. No, not to my knowledge.

Q. Is it your understanding of those two provisions, Mr. McKinley, that if—I appreciate, or at least my interpretation is that if dedications are made under "B", they won't be made under "C", or if they are made under "C", they won't be made under "B". A. That would be an interpretation.

Q. In that connection, is it your understanding whether either under "B" or "C", Tennessee will not be required to build any additional facilities to take this gas? A. I

have no knowledge of that particular phase of it, whether this would require them to build more or not. I couldn't answer, I am afraid.

Q. The reason I ask is nothing is said in that particular section, but coming to Part "D", Part "D" is a provision for additional reserves, the dedication of additional gas reserves, and as a part of that section, Part 3 provides that Tennessee can be required to build probably one mile of lateral gathering line for each 10 million Mcf that is added. A. I follow you.

Q. And I believe 100 Million Mcf can be added each year for 9 years, so that in any one year Tennessee can be required [138] to construct ten miles of gathering line for each ten million Mcf dedicated. Is that your understanding of this section of the contract, that Tennessee will construct and operate all the gathering facilities that are necessary to purchase or to take gas from C.A.T.C.? A. It is my understanding, yes, that would be correct, that they would gather.

Q. Directing your attention to page 15 of Item "A", Mr. McKinley, Part "C", near the bottom.

Presiding Examiner: What section is that?

Mr. Geneau: That is 8-C, near the last part of "C".

By Mr. Geneau:

Q. Could you tell me why the limiting figure of 700 pounds per square inch gauge was used in that connection? A. No, I can not, Mr. Geneau. That is a technical question, again, and I am not in a position to answer it for you adequately.

Q. One thing more, Mr. McKinley: I think in your prior testimony you used the phrase which appears in the contract, the phrase: "Maximum efficient rate of flow." Just what is meant by that phrase as you used it? A. The trouble with using words sometimes is you are not always sure what you are using in the way of a word. But "maximum efficient rate of flow", as far as I am concerned, is just exactly what it says, what you can flow at the most effic-[139]ient rate, and the maximum thereof. I wouldn't want to go into an engineering definition of it, because you wouldn't be able to get one from me. That is my understanding of it.

Q. I think that phrase was used in Section 3-D-1? A. Yes, I believe it was.

Q. Of the contract. A. Yes. It is used someplace else, too.

Q. Yes, probably so.

Mr. Geneau: We have no further questions, Mr. Examiner.

Presiding Examiner: Are there further questions before redirect?

Mr. Ryan: Your Honor, I don't have any further questions at this time. I would like to reserve the right to look at these documents which were placed in the record in case I may have some questions on them.

Presiding Examiner: Your time for cross examining the witness now, counsel. The documents were in the room and available for your use.

Mr. Ryan: They have been put into the record. I have not had an opportunity to examine them.

Presiding Examiner: Didn't you look at them before?

Mr. Ryan: I glanced at them for the purpose of deciding whether I should object to them being copied into the record or whether they should be put in as exhibits.

Presiding Examiner: Do you have copies of the documents? [140] Make them available, counsel.

Mr. Kirby: I thought your intention was that we would all have an opportunity to examine the record which is going to contain the printed exhibits. There would be no point in putting them into the record if we don't have a chance to examine them.

Presiding Examiner: Don't quarrel with the ruling. The time has now come for final cross-examination before redirect.

Do you have copies of the documents that counsel may use?

Mr. Voight: Yes.

Mr. Geneau: Might Staff ask for a 5-minute recess?

Presiding Examiner: We took one 5-minute recess that ran 15 minutes. Why do you want the recess, counsel? Just the ordinary recess?

Mr. Geneau: Pardon, sir?

Presiding Examiner: We can take a very short recess, but I am going to set it for five minutes and I want to hold it to five minutes. The hearing is—

Yes, counsel?

Mr. Woodfin: If it is at all possible, there are a great number of us here that have to catch air-

planes, and such as that. I don't know how many questions these gentlemen are going to have, but if we could finish today it would certainly be appreciated.

Presiding Examiner: The hearing is recessed for five minutes.

[141] (Whereupon, at 3:56 p.m., a recess was taken to 4.01 p.m.)

Presiding Examiner: The hearing will be in order.

Staff Counsel is not present. The hearing is recessed for two minutes.

(Whereupon, at 4:01 p.m., a recess was taken to 4:03 p.m.)

Presiding Examiner: The hearing will be in order.

By Mr. Ryan:

Q. Mr. McKinley, did you have anything to do with the negotiation of these supplementary agreements? A. No, I did not.

Q. Do you have any knowledge of any further agreements that may be existing between the applicants here and Tennessee with respect to this gas? A. I think you have them all.

Q. This is the sum total of them? A. I think it is.

Mr. Ryan: In view of the fact that the witness obviously doesn't know anything about these, I have no questions.

Presiding Examiner: Other counsel?

Mr. Kirby: Mr. Examiner, I want to state for the record that I haven't had sufficient time to examine these records and I think the Court should allow me enough time to look them over, over the evening. I will be perfectly ready to go and ask any questions first thing in the morning.

Presiding Examiner: What is your position on that? First [142] of all, did you make an effort to look at them during the recess?

Mr. Kirby: Mr. Examiner, there were six pages, as I understand it, and they first handed to Mr. Ryan and then as soon as he finished the first page I came back and started in on them. I did make an effort. I can speak with reference to the first page. Apparently—

Presiding Examiner: I don't know what it is now. We have been over that.

Mr. Kirby: You may have been over it.

Presiding Examiner: We have been over it. What did you do after the first page? Did you stop?

Mr. Kirby: No, I picked up the second page right here, it was a 5-minute recess, and during that period of time Mr. Ryan came back and he took that second page again.

Presiding Examiner: It was more than a 5-minute recess, because we were waiting for Staff Counsel to come in. Were you working on those things in the time available to you?

Mr. Kirby: I can't work that fast. It is impossible for me to do that.

Presiding Examiner: It is a very simple thing. I think you could have done it.

Anything else before redirect?

Mr. Simons: I join in Mr. Kirby's recess.

Presiding Examiner: What did you do during the recess?

[143] Mr. Simons: It seemed to me it was patently impossible to run through these during the recess.

Presiding Examiner: That is your assumption?

Mr. Simons: Yes, it is.

Presiding Examiner: Is there any redirect?

Mr. Voight: Continental has no redirect.

Presiding Examiner: The witness is excused.

(Witness excused.)

Presiding Examiner: Your next witness.

Whereupon, HOWARD R. BORN was recalled as a witness, having been previously duly sworn, was examined and testified further as follows:

Presiding Examiner: This witness was first examined by counsel for intervener Tennessee Gas Transmission. Are there any questions of the witness by any of the applicants?

Mr. Woodfin: I have one question, Your Honor.

Further direct examination by Mr. Woodfin:

Q. Mr. Born, you testified this morning as to the recoverable reserves which you had calculated under the dedicated acreage or under the reservoirs dedicated in the 95,000 acres under the four contracts, and as I recall, that was approximately one trillion point six cubic feet of gas; is that correct? A. That is correct, yes, sir.

[144] Q. Mr. Born, I ask you if you would make a calculation on how many acres are involved out of the 95,000 acres in that present calculation; have you made that determination? A. I made such a determination, yes, sir, and out of the 95,000 acres which are dedicated the four companies to Tennessee Gas, approximately 11,500 of those acres are contained in the area which I have estimated the 1,600,000,000 some-odd cubic feet of gas, which amounts to—or in other words, 12 per cent of the 95,000 acres is proven.

Q. Twelve per cent of the 95,000 acres, if I understand you, Mr. Born, is already proven, 1,600,000,000 cubic feet of gas; is that correct? A. That is correct.

Mr. Woodfin: Thank you.

Presiding Examiner: Further questions by applicants?

Mr. Voight: No, sir.

Mr. Foster: No, Your Honor.

Presiding Examiner: Cross-examination by counsel for Brooklyn Union and Long Island Lighting?

(No response.)

Presiding Examiner: Lake Shore?

Mr. Ryan: I have a couple of questions in the nature of clarification; I want to make it clear, however, that I do not purport to examine Mr. Born as to the accuracy of the figures contained in his Exhibit 2. We have not had an opportunity to [145] see the working papers and I presume that this study will again be presented by Tennessee in its own certificate case, 11107, and we will then have an opportunity to see the working papers and determine the accuracy of the statements.

Transcript of Hearing Held February 28, 1957 [Vol. I]
Howard R. Born—Recalled—Cross

Cross examination by Mr. Ryan:

Mr. Born, on the first page of Exhibit 2, which has any writing on it, the term is used there "non-associated gas". Could you more clearly explain what is meant by that term, please?

Mr. Littman: Just a minute, Mr. Examiner. I am going to object to this line of inquiry. The petition for intervention filed by Lake Shore very clearly restricts the interests of that petitioner to the matter of price, and the Commission's order granting intervention in this case limited the intervention to the matter specified in the petition to intervene.

That order said: provided that these parties are permitted to intervene, including Lake Shore, provided, however, that the participation of petitioners as interveners shall be limited to matters affecting asserted rights and interests specifically set forth in their respective petitions for leave to intervene, and so forth.

In the petition to intervene, copy of which I have before me, it says very clearly that their interest—I have it here—they say: "It appears from an examination"—reading from page 2 of the petition to intervene—they say that "It appears from an examination of the contracts between applicants [146] and Tennessee that the initial price provided for therein is 21.4 cents per Mcf, which price, to petitioner's knowledge, is higher than any price being presently paid to natural gas producers in the south or southwest area of the country", and later on they refer to the fact that—to the contention that

since the service proposed in the instant application may affect the rates under which Lake Shore purchases gas from its sole supplier, Tennessee, it, Lake Shore, has a vital interest in the application.

I can find nothing in this petition which makes any allegation which would entitle this petitioner to interrogate this witness concerning the substantiality or extent of the gas reserves.

Mr. Ryan: Mr. Examiner, I prefaced my question by saying that I am not going to question Mr. Born as to the substantiality of the reserves, I don't purport to, we haven't had the data upon which to do that. My question goes to clarifying this exhibit in connection with questions which are raised as to the meaning and intent of these contracts.

Now, Mr. Littman read from part of our petition to intervene. He didn't read far enough. On page 3—

Presiding Examiner: I read it. The witness may answer.

The Witness: Non-associated gas is just what it says, it is gas which is non-associated with oil, sometimes referred to as free gas, or gaswell gas, purely gas reservoir.

[147] By Mr. Ryan:

Q. Would that include gas which is known as condensate gas? A. Gas has, if it is rich or if it has any condensate in it, it would be condensate gas. Non-associated gas contains, many times, condensate.

Q. Now, on Line 20 of the first page of Exhibit 2, which has any writing on it, you make reference to the B.t.u.

content of the gas as being above 1,000? A. That is correct.

Q. From your studies were you able to determine how far above 1,000 this gas is in terms of B.t.u. content? A. I know the characteristic of gas in the Gulf Coast area—

Q. I didn't ask you that, I asked you this particular gas. Were you able to make any determination of this particular gas?

Mr. Littman: I think the witness should be permitted to continue with his answer and finish it.

Presiding Examiner: Answer the question.

The Witness: I did not look at an analysis of this particular gas because they haven't had any production from it. I don't recall that analysis. But from 18 years of experience in the Gulf Coast, I have yet to see, yes, sir, and I am going to get it on the record, any gas that I have considered to be below 1,000 B.t.u. content; it is just characteristic of the [148] gas in this area to be above 1,000 B.t.u.

By Mr. Ryan:

Q. But how far above this gas may be, you don't know; is that correct? A. I would say a lot of the gas averages as high as 1100, some close to 1200 B.t.u.

Q. Assuming the gas to be 1200 B.t.u., if the producers were to extract that down to 1,000 B.t.u., what would that be in terms of volume? What percentage would be extracted from the gas? A. I don't know the richness of the gas, so I couldn't tell you, sir.

Q. Assuming it to be 1200 B.t.u. A. I wouldn't know offhand. That is out of my category.

Q. Now, on Line 22 of that same page you make reference to remaining recoverable reserves. Is that reserves in place in the ground? A. That is original reserves which are recoverable. It is the in-place gas after I have applied a recovery factor to it, that is originally in place before production.

Q. That does not take into consideration the fact that some of this gas may be extracted by the producer before Tennessee ultimately gets it for sale to its customer, does it? A. If the operator or anyone takes condensate out of this, or puts it through a plant, you would naturally have to [149] shrink it.

Q. Mr. Born, are you aware of the fact that the contracts here involved permit the sellers of this gas to extract up to ten per cent of the volume of the gas? A. I don't know the percent, but I know there is, that either they or Tennessee, I believe—I am not the contract man—there is a right to extract, I believe.

Q. And to the extent that they did take out a certain volume of gas in the form of liquefiable hydrocarbons, then that would reduce the figures which are shown here on your exhibit, would they not? A. Yes, it would make a slight reduction.

Q. A slight reduction? A. Yes.

Q. Doesn't it depend on what percentage, volume-wise, they take out of the gas, whether it is a slight reduction or not? A. Well, to the total reserves it wouldn't amount to too much gas.

Q. Assuming they have the right to take out ten per cent of the volume, would you call ten per cent a small amount? A. I don't understand what you mean, ten per cent of the volume.

Q. Ten per cent of the volume of gas which is produced, they have the right to extract volumewise ten per cent; would [150] you call that a small percentage? A. You mean ten per cent of the total gas which is produced they will process?

Q. They will extract ten per cent for their own use, volumewise, ten per cent. A. Maybe you and I are on a different wave-length.

Presiding Examiner: You had better show him, make a reference to what you have in mind, counsel.

By Mr. Ryan:

Q. Do you have a copy of one of these contracts before you? A. No—I see there is one up here. What page?

Presiding Examiner: Do you have the reference?

Mr. Ryan: Yes, it is on page 11 of the typed copy. It is paragraph 6-B.

The Witness: 6-B.

By Mr. Ryan:

Q. Yes. The third line of that subparagraph B, there is contained the statement "Provided, however, that such processing will not, including shrinkage and fuel, remove more than ten per cent of the volume of gas produced and delivered by seller to buyer daily hereunder."

Do you see that, Mr. Born? A. Yes, sir.

Q. Would you call the reduction of the volume of gas by [151] a ten per cent figure a small amount? A. Well, it has "up to ten per cent". I don't know what the actual per cent would be.

Q. Assuming it were ten per cent, would you call that

a small amount? A. Well, what is ten per cent of one trillion six?

Q. Are you asking me what it is? A. Yes.

Q. 167 billion, isn't it? Am I correct? A. I presume that would be about right.

Q. Is that a small figure? A. Out of one trillion six, I don't think it is large.

Q. Now, from your Exhibit 2, I believe you testified orally to this figure 1.673 trillion. How did we arrive at that figure? Is that merely the addition? A. Yes, Mr. Ryan. If you will take Line 22 and add the totals up for each one, you will come out to the 1,673,000,000,000-some-odd cubic feet of gas.

Q. Does this figure represent the agreement contemplated by Section 5 of the contract between the producers and Tennessee? A. I have made no agreement with, or a determination, formal determination of reserves with the operator.

Q. To your knowledge has any been made? A. Not to my knowledge, no, sir.

Mr. Ryan: That is all I have of this witness, Mr. Examiner.

[152] Presiding Examiner: Counsel for the Public Service Electric and Gas.

Mr. Kirby: Mr. Examiner, I stated earlier in the day that I wouldn't be able to proceed with any cross-examination on a technical subject such as this. However, I assume that this same study will probably be introduced by the Tennessee Company in Docket G-11107, and that would give me sufficient time to have our people look it over and be prepared at that time.

So if I may just ask the witness that one question, whether he is preparing it for that later docket, I will be satisfied, without making a request for the delay that we would need.

The Witness: These reserves will be presented by Tennessee in Docket G-11107.

Mr. Kirby: That is satisfactory.

Presiding Examiner: New York Public Service Commission.

Mr. Simons: I have just a few questions.

By Mr. Simons:

Q. Would you turn to the third map, please? I note that you have different lines going around outline of productive limit. Could you explain to me what those different types of lines mean? A. Yes. The solid lines with the solid arrows indicates fault patterns, the arrow denoting the down-thrown side, the long-dashed line to the left indicates that the productive [153] limit as to either a gas-water contact or a gas down to a certain level. The symbol to the right, which is a line, a longer line with a smaller line projecting out to the right, indicates, in this case, that it is the limit of the sand. In other words, on the other side of that line the sand would pinch out. That is the extent of the sand to the east.

Q. And on this same map, I think the prior witness may have touched on it, but what does MCN stand for? A. Magnolia, Continental and Newmont, I believe is the name.

Q. What is the last one? I didn't catch that. A. Newmont. I believe that is correct.

Q. Now, in the course of your direct examination I think you stated that you obtained certain information

from the operator. I wonder if you could state, in general terms, at least, which information, as shown on your exhibit, was obtained from the operator and which was obtained or derived by you. A. The information I obtained from the operator was—which is more or less standard—was electrical loggings, well surveys—by that I mean directional well surveys—core records, any core analyses, production test, drill stem tests, any pressure test or temperature surveys available.

What I have obtained for myself, so to speak—Tennessee has a set of files on scouting information, which is standard, every company keeps it on wells which are drilled. And in addi- [154] tion to that, we have information on fields throughout this general area, and I draw upon that, as well as upon the information furnished to me by the operator.

Q. Are you able to state which of the information shown in your exhibit would be solely your responsibility or the responsibility of someone working under your direction and supervision, as distinguished from being information given to you by the operator? A. We use the information given to us by the operator and make our own interpretation of it.

Q. For example, turning to the very first page in the exhibit, excluding the blank page, what information on that sheet was solely your responsibility, as distinguished from information given to you by the operator? A. All of it was solely my responsibility. I obtained information from the operator which I used to arrive at these figures which are my responsibility.

Q. Just, for example, how about average depth; how did you determine that? A. I determined that from a

correlation of electrical logs that is not furnished by the operator, I made my own determination, you see. The same way with the depth of water contact. What I got from the operator I guess would be the total dedicated acres which is stated in the contract.

Q. Now, with reference to the maps, will you state what [155] information shown on the maps represents information given to you by the operator? A. Well, in the contract itself, or in an exhibit attached to that contract, there is, I guess, a tabulation showing the leases which are involved, and also, I believe, we were furnished a map by the operator showing the leases. And we checked that with the leases described in the contract. That is how we arrived at what dedicated acreage is. They furnished us description of the acreage as well as a plat showing the acreage.

Q. Now, sir, in the formal case file in this proceeding there is contained a memorandum to the Commission from the Bureau of Rates and Gas Certificates which contains in it the information that of Tennessee's additional reserves in G-11107, C.A.T.C. is to provide 1,769,000,000,000. I believe you stated a figure of 1,673,000,000,000. Are you familiar with the first figure I mentioned, and can you explain any difference? A. I am not familiar with the first figure you gave me, as reflected in the memo. I haven't seen the memo.

Q. Was any earlier estimate made—

Mr. Geneau: I am going to have to object, Mr. Examiner. It is my understanding—now, I may be wrong, but the gas Certs memos are a matter of confidential nature and presumably are not available

to outsiders for any purpose whatsoever; that they are only available for the personal information of [156] the Commission and the Staff.

Presiding Examiner: Is there any rule or regulation of the Commission to that effect?

Mr. Geneau: I can't point to a written one. But it is my understanding that that is the unwritten rule, and this is the first time I have ever known gas certs. memos to even come up. If that were the case, we could merely introduce them as evidence in all these cases and it would be that much easier.

Mr. Simons: It is part of the case file that I asked to see down in the reference room. I merely requested the formal file. If they would like to have it in evidence I would be glad to offer it in evidence.

Presiding Examiner: There may be a new rule on that. All right.

The Witness: I think the difficulty is—I don't have an exhibit in G-11107, but I believe that figure includes the, probably, the M.C.N. Gas and C.A.T.C., et al., but to satisfy your inquisitiveness, we have not reduced our reserve estimate and there is no change in the estimate on the actual so-called C.A.T.C. reserve estimates.

Like I say, the difference which you read and what I have shown here is that amount of reserve which is contained under the M.C.N. dedication to Tennessee Gas.

By Mr. Simons:

[157] Q. By subtraction of the two figures I get about 100 billion. Would that be your understanding of what

the M.C.N. dedication is? A. If I had my exhibit here I could tell you the exact figure.

Q. When you say your exhibit, you mean your exhibit in 11107? A. Yes, sir.

Q. But you don't recall it right now? A. I don't recall it offhand.

Mr. Simons: That is all I have of Mr. Born.

Presiding Examiner: Staff Counsel?

Mr. Geneau: Yes, Mr. Examiner.

By Mr. Geneau:

Q. Mr. Born, have you made any calculations at the request of the Staff? A. Yes. Staff asked me a few questions, and one of them was: How much of the total proven reserves I have are not tested by the conventional production method. I have this figure here. This is rounded—I mean it may vary a very small amount, but there is approximately 430,000 MMcf of untested reserves, and to get this back to trillion, there is 430 billion out of the 1,673,000,000,000 reserves which are untested.

I was further asked on a reserve ratio basis what would the minimum quantity be, daily quantity. So dividing, first, [158] the 1,673,000,000,000, which is the total proven reserves, by eight, I would get an average day minimum take of 209 million cubic feet.

And taking that 1,673,000,000,000 and subtracting from that the untested of 430 billions, I get a total of tested reserves amounting to 1,243,000,000,000 feet. Taking that figure and dividing it by 8, to get a minimum daily contract quantity it would be 155 million cubic feet a day.

Does that satisfy you on that part of it?

Q. Yes, it does. A. Then, in addition to that, Staff also asked me: In the gas purchase contract there is a tabulation showing the reservoirs in the East and West Cameron areas which are dedicated to Tennessee Gas Transmission Company. If you will note on that tabulation, it lists a multitude of these reservoirs, and Staff asked which of these I have currently set up in my reserve estimates.

So, for the record, I guess I just might read these off, Mr. Examiner: The numbers in the left hand columns I will read first, and the numbers in the right-hand column, which are the well identifications, I will read second:

The first one we considered is the 4897 to 4992, sand in Block 192, Well B-1. That has a well completion in it.

Presiding Examiner: Which one was that?

The Witness: 4897 to 4992.

[159] Mr. Voight: That is the third one, Mr. Examiner.

The Witness: Yes, sir. I might number these, Mr. Examiner, it might be a little easier than reading them off, or do you suggest I just continue reading them?

Presiding Examiner: Either way.

The Witness: All right.

The next one is the depth from 5182 to 5196. This sand is identified in Block 192, Well A-1. That is an untested reservoir which I consider proven.

The next one is 6110 to 6129. That is called the E-1 sand, segments 1 and 2, and that is in Block 192, the B-1 well.

The next sand is the 6212 and 6238, also in Block 192, the B-1 well, and that is set up based on core

analysis and electric log interpretation. In other words, it is untested.

The next one is 5987 to 6,040. That is found in or identified in Block 191, Well A-4.

It has completion in segment 1, and segment 2 is proved by core analysis and electric log.

Next sand is 5826 to 5944, located in Block 192, Well B-1, there is a completion in that sand.

Next one is 6585 to 6667, in Block 192, Well B-1, that is proved by core analysis and electric log.

Next one is 7241 to 7270, located in Block 192, Well A-1, another untested but proven sand by core analysis and electric log.

[160] Next one is 8,080, 8,098, in Block 192, Well A-1, a completion in that sand.

The next one is 8225, 8313, Block 192, Well A-1, there is a completion in Segment 1 and Segment 2 is proved by core analysis and electric log.

Next one is 8796, 8867, located in Block 192, Well A-1. There is a completion in that sand.

[161] Next one is 9483, 9552, located in Block 192, Well B-1, there is a completion in that sand.

Next one is 10,594 to 10,645, located in Block 49, Well A-2. That sand is set up proven based on core analysis and electric log.

The next one is 11,080, 11,099, located Block 49, Well A-2. That is set up by completion in that sand.

Next one is 7,005 to 7,045, located in Block 66, Well A-2. That sand is set up based on core analysis and electric log.

Next one is 6397, 6410, located in Block 62, Well

A-1. That sand is set up by core analysis and electric log.

Next one is 7126, 7186, located in Block 62, Well A-1. Set up by completion.

Next one is 7935 to 8027, located in Block 66, Well A-2, set up by completion.

The next one is from 7621 to 7765, located in Block 62, Well A-1, that is set up by completion.

Next one is 7129 to 7176, located in Block 71, Well A-1. That sand is set up by core analysis and electric log.

Next one is 7594 to 7682, located in Block 71, Well A-1, set up by completion.

Next one is 8,063 to 8,103, located in Block 71, Well A-1. That sand is set up by completion.

And the final one is 8443 to 8467, located in Block 71, Well A-1, and that is set up by completion.

[162] Now, just for matter of clarification: The block number and the well I have identified with the sands, it does not necessarily mean that that sand is completed in this particular well, but it may be completed in another well in the same section nearby, a well nearby in the same section. But I read it the way it was on this tabulation, so it would comply with the well in which the sand interval is identified in the contract.

By Mr. Geneau:

Q. Is it your understanding of these basic contracts, Mr. Born, that as additional acreages are dedicated that, if, as, and when they are dedicated that the applicants in this particular proceeding will come into the Commission and file for certificates—

Mr. Littman: I am going to object to that, Mr. Examiner.

Presiding Examiner: It sounds like the objection is a good one, counsel.

Mr. Geneau: Might I know the reason for the objection?

Presiding Examiner: You are asking him what the applicants are going to do on legal advice.

Mr. Geneau: No, I asked him what his understanding of the contract is. He is one party to the contract.

Presiding Examiner: That isn't in the contract. What do you have reference to particularly, a satisfactory certificate provision?

Mr. Geneau: No, no, Mr. Examiner, no satisfactory [163] certificate.

Presiding Examiner: Will you stand, counsel?

Mr. Geneau: No, not that particular provision. I was thinking that under certain provisions of this contract as it now stands certain acreages are dedicated as of now. Under certain other provisions additional acreage may be dedicated. Under certain other provisions still more additional acreages may be dedicated. I was speaking in terms of those acreages which can be dedicated in the future, provision being made for them in this contract.

Presiding Examiner: You are asking him whether he understands that the applicants are going to apply for a certificate?

Mr. Geneau: That is correct.

Presiding Examiner: Objection sustained.

Transcript of Hearing Held February 28, 1957 [Vol. I]
Howard R. Born—Recalled—Cross

By Mr. Geneau:

Q. Are you familiar with these contracts, Mr. Born? A. I have read them, but I am not the man to, Mr. Counsel, testify on the contracts, its provisions, nor interpretation. I rather think you could better and more accurately get that information from Mr. Witmer.

Mr. Geneau: We have no further questions.

Presiding Examiner: Further questions before redirect?

Mr. Ryan: I have one or two further questions, Mr. Examiner.

By Mr. Ryan:

[164] Q. Mr. Born, when you refer to untested reservoirs or untested sands, do you mean that they have not been flow-tested, is that all you mean by that? A. That is correct.

Q. Now, you referred to the minimum contract quantities under these contracts. Do you know what the maximums are? A. No, sir. What I am referring to is in the contract it states the first year we will take 175 million cubic feet a day. After that it is on a reserve ratio basis.

Q. Which is what you computed for the staff; is that correct? A. Yes. And the minimum daily take on a reserve ratio basis, that is what I meant by the figures I previously testified to at the request of the staff.

Q. One further question: What percentage of the total reserves of Tennessee will these reserves, these CATC reserves, constitute? A. I think in our G-11107 filing we show total available to Tennessee of 14,800,000,000,000

cubic feet of gas. That is rounded off. And this being 1,673,000,000,000-some-odd, I guess it would be on the order of 11 or 12 percent.

Q. Based upon your answer to my question about the extraction of 10 percent, would you say that that 10 percent is a small figure, too?

Mr. Littman: I object to that, Mr. Examiner.

[165] Presiding Examiner: Objection sustained.

Mr. Ryan: On what ground?

Presiding Examiner: Don't challenge anything as obvious as that, counsel.

Mr. Ryan: As obvious as what, Mr. Examiner?

Presiding Examiner: You are asking this witness to give his expression of an opinion when you multiply a figure by 10 percent and that is improper.

Mr. Ryan: I asked the witness to tell me in his opinion was that a small figure?

Presiding Examiner: The objection is sustained.

Mr. Ryan: On what ground? I have the right to know.

Presiding Examiner: Ground stated.

Mr. Ryan: By whom?

Presiding Examiner: Counsel, you are going beyond the bounds of propriety. The ruling has been made.

Mr. Ryan: No further questions.

Presiding Examiner: Are there further questions before redirect?

The Examiner is concerned about one matter, and that is the form in which counsel have reserved with respect to cross-examination on reserves.

Now, the Examiner doesn't have to advise counsel on how to proceed with the cross-examination of a witness in order to establish upon the record the necessity for additional time. [166] At the same time the Examiner does not wish this record to convey his consent to a reservation which in form or otherwise would in any way produce a situation where a delay in these proceedings or a consolidation of two separate proceedings would have to be effected.

Now, are there any further questions of this witness?

Mr. Voight: Continental has no further questions, sir.

Presiding Examiner: The witness is excused.

(Witness excused.)

Presiding Examiner: Anything further before the evening recess?

The hearing is recessed to reconvene in this room tomorrow morning at 10 o'clock.

(Whereupon, at 4:47 p.m., the hearing was adjourned until Friday, March 1, 1957, at 10 a.m.)

CONTENTS

[A] WITNESS:

	Direct	Cross	Redirect	Recross
William W. Witmer		173	289	302
			308	309

EXHIBITS:

	Identified	Received
No. 3 (Agreement between Tennessee Gas Transmission Company and Continental Oil Company, dated January 31, 1956.)	218	(Rejected 314)
No. 4 (Agreement between Tennessee Gas Transmission Company and The Atlantic Refining Company, dated January 31.)	218	(Rejected 314)
No. 5 (Agreement between Tennessee Gas Transmission Company and Tidewater Associated Oil Company, dated January 31, 1956.)	218	(Rejected 314)
No. 6 (Agreement between Tennessee Gas Transmission Company and Cities Service Production Company, dated January 31, 1956.)	219	(Rejected 314)

RECESSES:

Morning: 215

Noon: 248

Afternoon: 300

Transcript of Hearing Held March 1, 1957
[Vol. II]

[167] BEFORE THE

Federal Power Commission

In the Matters of:	
CONTINENTAL OIL COMPANY	Docket No. G-11024
THE ATLANTIC REFINING COMPANY	Docket No. G-11034
CITIES SERVICE PRODUCTION COMPANY	Docket No. G-11046
TIDEWATER OIL COMPANY	Docket No. G-11049

Hearing Room "D"
Federal Power Commission
GAO Building
441 G Street, Northwest
Washington, D. C.

Friday, March 1, 1957.

The above-entitled matters came on for hearing, pursuant to adjournment, at 10:00 a.m.

Before—EWING G. SIMPSON, *Presiding Examiner.*

APPEARANCES:

(As heretofore noted.)

Proceedings

[168] Presiding Examiner: The hearing will be in order.

At page 166 of the transcript, just before concluding yesterday's session, there is an observation that the Ex-

aminer made that should be broadened. Therefore, lines 1 through 4 on page 166 should read as follows:

"At the same time the Examiner does not wish this record to convey his consent to a reservation which in form or otherwise would in any way produce a situation where a delay in these proceedings or a consolidation of two separate proceedings would have to be effected."

Mr. Kirby: Mr. Examiner, along that line, I have one other preliminary matter I would like to point out to the Examiner with regard to the transcript.

On page 142 somehow, I suppose in transcribing, the notes fail to show that the length of the recess your Honor called in order to permit staff counsel to enter the room was two minutes. Then, by that omission, I direct the Examiner's attention to line 16, where your Honor stated it was more than a five-minute recess because we were waiting for Staff Counsel to come in. Then your Honor said,

"Were you working on those things in the time available to you?"

Now, if the record shows the two-minute recess, that would mean at most I would have had seven minutes to work [169] on the pages involved.

I would like the reporter to check the transcription and insert the two-minute recess.

Presiding Examiner: There was a little more to it than that, I waited two minutes before I took that two-minute recess. The witness who was on the stand yesterday is here in the room this morning. Do you have any questions you want to put to him?

Mr. Kirby: No, I have no questions, your Honor.

Presiding Examiner: I understand.

Mr. Kirby: The position you put me in with my client—

Presiding Examiner: You are entitled to that clarification, Counsel.

Mr. Kirby: Thank you.

Presiding Examiner: Anything further?

Mr. Ryan: Your Honor, in that connection, I have certain questions to ask about these documents which were transcribed into the record. When I had a chance to go over them last night I found out that the time allotted was certainly not sufficient. I didn't understand them yesterday and it wasn't until last night that I had sufficient time to go over them that I feel that I did understand them.

I think perhaps Mr. Witmer can answer those questions, but I would like to reserve the right to call back Mr. McKinley, in the event Mr. Witmer cannot answer the questions.

[170] Presiding Examiner: Counsel, I did not get into a question that I think is latent in those documents, that is, that they are conditional. The Examiner has no desire to make any special point of that, but I assume your questions would not be extensive.

Mr. Ryan: Would not be extensive, your Honor?

Presiding Examiner: Yes.

Mr. Ryan: I don't believe they will be extensive. I don't know what the Examiner means by "conditional."

Presiding Examiner: Isn't there a contingency stated in the body of each one of those documents?

Mr. Ryan: Not with respect to the ones I am referring to.

Presiding Examiner: There is no contingency in those?

Mr. Ryan: No, sir.

Presiding Examiner: All right.

Before Mr. McKinley leaves the room, Counsel, would you advise the Examiner that he is leaving, in connection with the matter that Counsel for Lake Shore just mentioned?

Mr. Voight: Yes, sir. He is here.

Presiding Examiner: When I say "to leave the room," I mean permanently.

Mr. Voight: Yes, sir.

Presiding Examiner: Next witness for cross-examination.

Mr. Russell: Before that, may I make an inquiry of [171] counsel for the applicants with respect to these documents or letters that have been referred to this morning?

In reading the transcript last night, it is not clear to me: were any of these documents, these letters that were incorporated in the record yesterday annexed to the application or to the contracts that were submitted to the Federal Power Commission in these proceedings?

Mr. Voight: No, sir. We do not consider that those documents are amendments to the contract, nor that they affected the price, except in so far as the one was concerned, the effectiveness was conditioned upon the Federal Power Commission not having jurisdiction.

Mr. Russell: So that the first notice anybody had of those documents was yesterday afternoon when they were asked for as a result of some cross-examination by Staff Counsel?

Mr. Voight: I couldn't say that, sir, I don't know.

Mr. Geneau: In all fairness there, Mr. Examiner, the application of the applicant did indicate that amendments were made to the contract which was attached to the appli-

cation in this proceeding. But outside of that, there was no attachments to the contract.

Mr. Russell: One other inquiry, Mr. Examiner, if I might.

These documents were incorporated by having them transcribed in the record. I wondered if it isn't the usual [172] practice to have them indexed when that has taken place?

Presiding Examiner: They could have been indexed.

Mr. Foster: Mr. Examiner, that, I believe, may proceed upon an assumption that is contrary to the indicated position of the applicants that they constitute a part of—

Presiding Examiner: Yes, we won't have to go into detail. They went in just as if it were testimony from the witness. That is the way I was looking at it at the time.

Mr. Russell: I don't want to belabor the point, Mr. Examiner, but they are not testimony, they are separate documents, and it seems to me that it has been the practice of the Commission where documents are written into the record to at least have them indexed.

There is no way of referring to these except through the testimony.

Presiding Examiner: That is no problem.

Mr. Russell: Isn't it the custom of the Commission?

Presiding Examiner: Let's not get into that. I think I adopted a reasonable basis and we passed that point yesterday.

The next witness?

Mr. Littman: We tender Mr. Witmer for cross-examination, your Honor.

Whereupon, WILLIAM W. WITMER [173] was recalled as a witness, and, having been previously duly sworn, was examined and testified further as follows:

Presiding Examiner: Are there questions of the witness by any of the applicants?

Mr. Voight: Continental has no questions.

Mr. Foster: None at this time, Mr. Examiner.

Presiding Examiner: Very well.

Cross-examination by counsel for the Brooklyn Union Gas Company and Long Island Lighting Company, interveners.

Mr. Russell: I have a few questions, Mr. Examiner.

Presiding Examiner: Very well.

Cross-examination by Mr. Russell:

Q. Mr. Witmer, I think probably my questions are in the nature of clarification and not particularly cross-examination. They relate primarily to the statement, or the answer that you made to Mr. Littman's question at the bottom of page 49 of the transcript and your answer appearing on page 50, namely:

"Do any of the provisions of these contracts affect or trigger any of Tennessee Gas Transmission Company's existing favored nations or renegotiation clauses in its other gas purchase contracts?"

And your answer to that question was "no."

Now, in the contracts that were submitted here yesterday, [174] they refer to the East Cameron, West Cameron and Vermilion areas. May I ask: does Tennessee have any existing contracts to purchase gas in Cameron and Vermilion Parishes, in Louisiana? A. Yes, sir, Tennessee does.

Transcript of Hearing Held March 1, 1957 [Vol. II]
William W. Witmer—Recalled—Cross

Q. Do those contracts contain either two-party favored nations clauses, three-party favored nations clauses, or price redetermination clauses? A. They contain favored nations clauses whereby Tennessee will pay the seller in each particular contract the same price Tennessee pays to any other seller from whom it buys gas in that particular area.

That is probably what you are referring to, is a two-party favored nations clause.

Q. Yes. A. And they do contain—most of them contain price redetermination clauses based upon the three highest prices being paid in the specified areas at certain intervals during the term of the contract.

Q. Could you tell me what area of Louisiana those contract clauses operated in? A. They operate in, I believe it is seven parishes, Mr. Russell, the southernmost of which are Cameron and the parish immediately to the east of Cameron Parish. I don't recall the names of all the parishes right now.

[175] Q. What is the price Tennessee is presently paying for gas under those contracts in that area? A. It is slightly over 10 cents, at 15.025.

Q. Would you refer now to the transcript, pages 107 and 108, where the transcript contains the substance of the letter that you wrote to Continental Oil Company, dated August 17th, 1956, and the portion of that letter that I am going to refer to starts at the bottom of page 107, and reads as follows:

"In the event it is determined by statute or by judicial process that the Federal Power Commission does not have control over prices which producers such as Continental are allowed to charge for gas sold to gas transmission

companies such as Tennessee during the term of the contract, or in the event the Federal Power Commission accepts and allows to go into effect rates which producers are allowed to charge for gas sold as a result of the operation of favored nations clauses and price redetermination clauses in gas purchase and sales agreements similar to the above-mentioned contract, with respect to provisions affecting price, quantity, quality and delivery, Tennessee agrees to amend said contract and add thereto a favored nations clause and price redetermination clause substantially similar to and like those contained in the gas purchase and sales agreement dated January 31, 1956, between Tennessee and Continental covering gas located [176] in the West Delta Area, Gulf of Mexico."

Now, could you tell me what the provisions are in the favored nations clause and the price redetermination clause in the contract between Tennessee and Continental dated January 31, 1956, covering the sale of gas in the Delta area? A. I don't have a copy of that contract with me, Mr. Russell. I can tell you generally.

Q. Generally will be satisfactory. A. The favored nations clause in the contract to which you referred is a two-party favored nations clause and refers to the West Delta Area, as I recall, which is an offshore area similar to—at least, it is designated similarly to the offshore areas involved in the four contracts in these consolidated proceedings.

The price redetermination clause is exactly as those existing in most of the other Tennessee Gas purchase contracts, which is based upon the three highest prices being paid at the time the price redetermination is set for.

Transcript of Hearing Held March 1, 1957 [Vol. II]
William W. Witmer—Recalled—Cross

Q. What is the area covered by the favored nations clause in which that clause is operative? A. You mean in the Delta contract?

Q. In the Delta contract, yes. A. To the best of my recollection, Mr. Russell, that is the area in which Tennessee is presently paying 17 cents [177] at 15.025 pounds per square inch absolute for gas, is composed of, I believe, either four or five parishes in Southeastern Louisiana, none of which are contiguous to or close to the area involved in the contracts which are the subject of these consolidated proceedings.

Q. Then, I am not clear. You would incorporate in these new contracts a favored nation clause but for a different area than specified in the Delta contract. A. No, sir, you didn't read far enough in the letter. The next sentence, if I may read it—

Q. I am going to go into the next sentence. A. Well, that is the answer to your question.

Q. So that all that that meant in the reference to the Delta contract, that it would be a similar favored nation clause but not covering the same operative area as the Delta contract covers, is that right? A. Well, it says just what you read, substantially similar, yes, sir.

Then, as I stated, it says below the area in which these clauses will be operative will be the area located south of the red line plotted on the official leasing maps attached hereto.

Mr. Russell: Mr. Examiner, I wonder if I might have a copy of that map that is referred to, the one that has the red line plotted on it?

[178] Presiding Examiner: Have you seen it?

Mr. Russell: No, sir, I have not.

Presiding Examiner: It was available to all counsel in the room, Counsel.

Mr. Russell: I am going to ask a question about it. Isn't it possible to have it here? I asked Mr. Voight and he assured me it would be here.

Presiding Examiner: All right.

Mr. Woodfin: I furnished a copy to Mr. Ryan yesterday. He has it there. All he has to do is hand it to Mr. Russell.

Mr. Ryan: Yes.

Mr. Russell: I don't have a red line marked on it.

Mr. Woodfin: That is a photostat. If you look, you will see a darker line on the top. This is the red line (indicating).

Mr. Russell: This is the red line?

Mr. Woodfin: That is right.

By Mr. Russell:

Q. Mr. Witmer, I wonder if you could tell me what is the significance of this red line that is referred to during the testimony and as indicated on this map, which was attached to this letter? A. To clear this whole thing up, Mr. Russell, that red line is where we—where I felt the outermost state boundary line might be set. So it was drawn on the map to [179] keep these clauses, if they are ever inserted into the contracts which are the subject of these proceedings, from triggering any of Tennessee's favored nation or price redetermination clauses in its Southwestern Louisiana pricing area.

And, as the rest of the letter states, that is the way the favored nation and redetermination clauses would be

inserted and used. And to make a long story short, if they are inserted they will not trigger any of Tennessee's other contracts.

Q. The area north of the red line would be an area that would be covered by the existing contracts, favored nation clause area? A. Well, Mr. Russell, it is not quite that simple. That area out in the water north of that red line, and I think the northernmost line is probably representing the shore line of the State of Louisiana, that area between the shore line and the red line is still in dispute, so to speak, between the State of Louisiana and the Federal Government. But at any rate, it might become state property.

Q. And if it does? A. If it does, then it will not fall within the area contemplated by the clauses which are covered by this letter.

Q. But would it fall within the area covered by the favored nations clauses in your existing contracts? [180] A. That is a good question. I don't know whether it would or not, because the favored nation clauses as they exist in those contracts in the Southwestern Louisiana pricing area refer only to parishes, as the parishes were constituted at the date of the contract.

Now, that is a question I, or I doubt anyone else could answer because we don't know how far the state boundary goes out into the water.

Q. Do the parish boundaries, are they coextensive with the state boundary? A. I don't know.

Q. Referring on to a further sentence in your letter, on pages 108 and 109, the letter says:

"However, if during the term of said contract the boundary dispute relating to title to the submerged lands

located off-shore of the State of Louisiana between the United States and the State of Louisiana is judicially determined or settled, Buyer and Seller agree that effective as of the date said boundary dispute is so determined, the favored nations and redetermination clauses referred to immediately above will be operative in the areas located South of the most Southerly boundary line of the State of Louisiana so determined."

If, as a result of the settlement of that dispute, the boundary line of the State of Louisiana was determined to be south of this red line, I take it that your favored nations [181] area in this contract would be moved further south? A. That is what that sentence says, yes, sir.

Q. And the area north of that, if the boundary line of Louisiana is determined in this dispute to be further south of this red line, the area north of the boundary line of Louisiana so determined might possibly be within the favored nations clause of your existing contracts in Cameron and Vermilion Parishes? A. Possibly, yes, sir; it may be and it may not be.

Q. Isn't that the reason why you moved the line south with the boundary line of the State of Louisiana moving south? A. Certainly, that is the reason.

What I meant by that is the portion of the State of Louisiana if there is any determined to be so that lies south of the shore line and in the water, may or may not be in the parishes, you see. That is why I qualified my answer.

Q. I understand that, Mr. Witmer. But if that is not determined, I mean if it is not clear in your own mind, how could you answer Mr. Littman's question so positively? Because it seems to me if the boundary line of

the parishes moves south, as the boundary of the State of Louisiana moves south, then it would be within those parishes and it might be covered by your [182] favored nations clause in your existing contracts. A. Mr. Russell, you just read the sentence that says these clauses won't operate in the State of Louisiana. It was the last sentence you read. I don't know how to make it any clearer than that sentence says:

". . . if during the term of said contract the boundary dispute relating to title to the submerged lands located off-shore of the State of Louisiana between the United States and the State of Louisiana is judicially determined or settled, Buyer and Seller agree that effective as of the date said boundary dispute is so determined, the favored nations and redetermination clauses referred to immediately above will be operative in the areas located South of the most Southernly boundary line of the State of Louisiana."

Q. That is as to this contract. But I am talking about your existing contracts. Won't the favored nations area in those be expanded as the boundaries of the parishes are expanded southward?

Mr. Foster: I object to this.

The Witness: What difference will it make?

Presiding Examiner: Just a minute.

Mr. Foster: I object. It obviously relates to what may happen in other contracts not involved in this proceeding and not related to this proceeding.

Presiding Examiner: I am convinced he has answered [183] to the best of his ability, Counsel.

Transcript of Hearing Held March 1, 1957 [Vol. II]
William W. Witmer—Recalled—Cross

By Mr. Russell:

Q. The area covered by this dispute, Mr. Witmer, might or does include the area in which these leases are in existence, does it not? A. I understand that it does.

Q. In fact, in the letter that starts on Transcript pages 115 and 116 where you are talking about the gathering taxes, it specifically says that some of the leases are in the area which is under dispute between the Federal Government and the State of Louisiana. A. I agree, I say I understand that, too.

Presiding Examiner: May I have that question and answer?

(Question and answer read.)

Presiding Examiner: You mean north of that so-called red line?

The Witness: Mr. Examiner, he had asked me the prior question—

Presiding Examiner: I am not interested in what he has asked you, now.

The Witness: I don't understand your question, sir.

Presiding Examiner: Are any of the blocked-in leases on Exhibit 1 north of that red line?

The Witness: No, sir.

[184] Presiding Examiner: Are any of the leases subject to the applicants' contracts with Tennessee Gas in this proceeding north of that red line?

The Witness: No, sir.

Presiding Examiner: I didn't understand—

Mr. Russell: Mr. Examiner, the point is that

the area in which these leases are located is the area in which there is a dispute between the Federal Government and the State of Louisiana as to the boundary line of the state.

Presiding Examiner: You are now talking in terms of the West Cameron area, and the East Cameron area and the Vermilion area as a whole?

Mr. Russell: That is right.

Presiding Examiner: But not with respect to any leases that are involved under the contracts in these proceedings?

Mr. Russell: Yes, I am talking about the leases, they are in that area which is involved in the dispute, as set forth in the letter on page 116.

Presiding Examiner: They are not in the disputed area.

Mr. Russell: They are. On page 116—

Presiding Examiner: Let's not get into a direct contradiction.

The witness has just testified and if you disagree with that testimony, you should straighten it out.

Mr. Russell: He didn't disagree with the question I [185] asked him.

Presiding Examiner: All right.

Mr. Russell: The point of the thing is, Mr. Examiner, that boundary line moves south if the State of Louisiana is determined to be further south than it is, as plotted by this red line. That area is expanded to the south, if so, it becomes part of the parishes of Cameron and Vermilion, possibly.

Transcript of Hearing Held March 1, 1957 [Vol. II]
William W. Witmer—Recalled—Cross

Presiding Examiner: To the end of the Continental shelf?

Mr. Russell: It may be. That is what my preliminary questions of this witness were.

Presiding Examiner: There is nothing in the record on the area of the dispute.

Mr. Russell: Let's have the record read back on the questions I have asked.

Presiding Examiner: No.

Mr. Russell: That is exactly what I brought out through this witness.

Presiding Examiner: All right. If you did, I will find it.

Mr. Russell: All right.

The point is, as that line is moved south, if the state boundary is moved south, it may involve the price of gas being paid under these contracts being in the area covered [186] by the favored nations clauses in Tennessee's existing contracts, and thereby have a triggering effect on them.

Presiding Examiner: Very well.

What is the nature of Louisiana's claim?

Mr. Russell: Maybe counsel for the applicants could answer that.

Presiding Examiner: No. That is what you assured me was very definitely in the record.

Mr. Russell: I said there was a dispute. I will read the part of the letter that says so.

Presiding Examiner: I can read that, counsel. Let's get along.

Transcript of Hearing Held March 1, 1957 [Vol. II]
William W. Witmer—Recalled—Cross

By Mr. Russell:

Q. Mr. Witmer—

Presiding Examiner: Wait just a minute.

I do want to straighten something out.

Will you refer to page 116?

The Witness: Yes, sir.

Presiding Examiner: Now, as I have understood your testimony here just a moment ago, it would be in conflict with what is stated between lines 7 and 11, to the effect that the parties realize that certain of the leases dedicated to the contract are so located that the lands covered by such leases may be claimed, both by the State of Louisiana and the Federal Government?

[187] The Witness: No, sir, it is not in conflict. You asked me if any of the leases were located north of the red line on that map, and they are not.

The red line, however, is not the southernmost boundary of the area in dispute.

Presiding Examiner: What is the southernmost boundary?

The Witness: I don't know. I don't know how far Louisiana is claiming out into the sea, probably to the end of the Continental Shelf, I suppose.

By Mr. Russell:

Q. Mr. Witmer, would you refer to page 112 of the transcript? A. Yes, sir.

Q. That page of the transcript is part of what appears to be an agreement between Transcontinental and Tennessee dated August 20th, 1956—Tennessee and Continental, excuse me.

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William W. Witmer—Recalled—Cross

Now, may I direct your attention to paragraph 3 appearing on page 112, which states:

"In the event satisfactory certificates have not been issued by April 1, 1957, Tennessee will deliver to Continental, as Operator, at Continental's option, to be exercised at any time after April 1, 1957, but before January 1, 1958, sufficient steel pipe, fittings, valves, and connections to construct the pipeline or pipelines pursuant to the said [188] plans and specifications (Item 2) from such delivery point to shore."

Can you tell me, Mr. Witmer, what is the estimated cost of the pipe and fittings and valves that are referred to in that paragraph? A. Yes, sir. I put those in the record on direct. I will repeat them, if you wish.

Q. Is it part of the 16 million that you referred to yesterday? A. Yes, sir.

Q. Does the same thing apply to the facilities referred to in paragraph 4, or is that something in addition to the cost that you mentioned yesterday? A. It is the same thing, yes, sir.

Q. May I direct your attention to page 113, paragraph 7 of that agreement.

"In the event Continental exercises the rights herein granted by Tennessee under Items 3 and 4, in whole or in part, it is agreed that the gas purchase agreement between Tennessee and Continental will not be terminated by failure of a party to secure satisfactory certificates prior to January 1, 1958."

Now, is it your understanding of that paragraph that in the event that Continental exercises the option that it has under paragraphs 3 and 4, that the time in which Tennessee will have to secure a satisfactory certificate is

[189] January 1, 1958? A. If they do elect to exercise those options under 3 and 4 and receive all those materials from Tennessee, I think that is correct.

Of course, I don't know whether they are going to or not.

Q. Directing your attention, Mr. Witmer, to pages 109 and 110 of the transcript, I take it that Continental has asked you to forward all the plans and specifications that are referred to in that letter, because Tennessee has not secured a certificate by February 1st, 1957, is that correct? A. Mr. Russell, I received this letter from Continental but I have not delivered any plans or specifications to Continental. I think perhaps they might have sent me that letter just to, in a manner of speaking, maybe to preserve their rights or something. But I have not furnished them any plans and specifications.

Q. It really is to preserve their rights, as you put it, which are set forth in paragraph 2 of the agreement transcribed in the record on pages 111 and 112, is that correct? A. Well, I don't know, they sent me the letter. I shouldn't have said that, I guess, it is a supposition on my part. I don't know why they sent me the letter.

I just say that I have not replied to the letter nor [190] have I furnished them any plans and specifications.

Q. That paragraph 2 says that if you don't receive a certificate by February 1st, 1957, that at Continental's option you have to furnish certain plans and specifications? A. That is correct, yes, sir.

Q. That is what they have asked for? A. Yes, sir. They sent me that letter.

Transcript of Hearing Held March 1, 1957 [Vol. II]
William W. Witmer—Recalled—Cross

Mr. Russell: Pardon me, Mr. Examiner, a moment. I just have one other question, Mr. Examiner.

In reading the record last night, it seemed to me there was some confusion about the provision in the agreement relating to the substitution of gas from the Delta area. It is paragraph 3-J of the agreement, and I would like to ask Mr. Witmer his understanding of the purpose of that substitution agreement, what his understanding is.

Presiding Examiner: Very well.

By Mr. Russell:

Q. Could you tell me that, Mr. Witmer? A. Yes, sir. My understanding of that particular section—and incidentally I wrote it—under the West Delta contract between Tennessee and Continental and also under the West Delta contracts between Tennessee and the others of the producers who are applicants in these consolidated proceedings, there is dedicated to Tennessee Gas reserves which [191] are particularly rich in distillate, condensate, whatever you want to call it. In fact, it is my understanding that that particular reservoir is so saturated that it is saturated at reservoir conditions.

Now, any production, probably, from that reservoir, would result in retrograde condensation in the reservoirs. So there is a good possibility that the State of Louisiana, from whom those leases covering that reservoir were acquired, might require the producers to cycle that gas and recover those liquids, or the producers may at their own volition cycle the gas and recover those liquids.

In that event, the deliveries to Tennessee under the West Delta contracts would be curtailed to the degree that gas which would have been delivered to Tennessee from that reservoir will not be delivered at that time, but would be delivered at a later time after the cycling operations had been completed.

To enable Tennessee to receive the amounts of gas for which it has contracted, and also to give the producers the right to go ahead and deliver the total amounts for which we have contracted, I then drew up this provision which in my interpretation allows them to deliver gas from the reserves covered by the contracts which are the subject of these proceedings, in place of gas which would have been delivered had the cycling operations not been commenced [192] from the reservoirs that I mentioned in the West Delta area.

The West Delta contract provides, of course, though, that when the cycling operations are completed, the gas that is returned to the reservoir will then be delivered to Tennessee. So what it amounts to, it is not really a substitution; they merely pick up the curtailed deliveries or the deliveries that would have been curtailed in West Delta and deliver gas from these reserves in place of that, and then at some later date the gas in the West Delta area will then be delivered in place of gas reserves that would have remained in the ground during that time under these contracts.

Is that sufficiently clear?

Q. And that the price to be paid for gas delivered under these contracts would be the price provided in the contract, when the Delta gas is cut back, so to speak, and additional quantities are delivered under these contracts?

A. I will put it this way: the gas to be delivered or the gas that is dedicated under this contract will be sold to Tennessee at the price provided for in this contract, and the gas dedicated to Tennessee under the Delta contract will be sold to Tennessee under that price, so it all comes out the same.

Mr. Russell: That is all I have, Mr. Examiner.

I think such reference has been made to this map [193] which was attached to the letter and forms an important part of the letter, as I see it, because the letter itself refers to the red line that is shown on here, I think this map should be made a part of the record.

I will ask to have marked for identification, if it is all right with Mr. Ryan, the copy that I have in my hands.

Mr. Ryan: It is all right with me.

Mr. Russell: I only have this one copy.

Presiding Examiner: I tried to avoid putting anything unnecessarily into the record. Do you have any objection?

Mr. Woodfin: I didn't want to object, but I can see that it serves no useful purpose to have the thing in the record. It is a conditional letter that may become effective in the future if the Federal Power Commission has no jurisdiction. It certainly can't affect anything in this proceeding at this time, no matter where the red line is.

I can't see that it is relevant or material to this proceeding to have it in this present certificate case. That would be a matter which would come up in, no

telling, ten years from now, if it ever became effective at all.

Presiding Examiner: Can you give a general description of where that red line is located?

Mr. Geneau: Might I interpose, Mr. Examiner, and say perhaps that red line could be put on Exhibit 1, here.

Mr. Russell: That would be satisfactory.

[194] Presiding Examiner: Can you do that? Take a look at both of them and see if you can do it.

The Witness: Yes, sir, I can.

Mr. Russell: That will be satisfactory with me, Mr. Examiner. I will withdraw my offer of having it marked for identification.

Presiding Examiner: Very well.

Mr. Witmer, will you read the definition, define that red line by reference to the blocks set forth on Exhibit 1?

The Witness: Yes, sir.

Commencing at the westernmost boundary of the West Cameron area offshore of the State of Louisiana, the line begins at the southern boundary of Block 53 and continues in an easterly direction to the southwest corner of Block 67, at which point it turns—

Presiding Examiner: Just a moment.

Block 67.

The Witness: —to the southwest corner of Block 67.

Presiding Examiner: You started where?

The Witness: On the southwest corner of Block 53.

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William W. Witmer—Recalled—Cross

Presiding Examiner: Southwest or northwest?

The Witness: Southwest.

Presiding Examiner: I have it.

All right.

The Witness: From the southwest corner of Block 67, [195] the red line turns south and goes to the southwest corner of Block 70.

Presiding Examiner: What corner?

The Witness: Southwest.

Presiding Examiner: Southeast?

The Witness: No, sir.

Presiding Examiner: I have it, very well. You are right.

The Witness: From which point the line turns east and goes to the southeast corner of Block 69, from which point the line turns south and runs contiguous to the boundary line between West and East Cameron areas to the southwest corner of Block 28, East Cameron area, from which point the line runs east to the southeast corner of Block 26, East Cameron area, from which point the line turns south and runs to the southwest corner of Block 32, East Cameron area, from which point the line turns east and runs to the southwest corner of Block 34, East Cameron area, from which point the line turns south and runs to the southwest corner of Block 41, East Cameron area, from which point the line turns east and runs to the southeast corner of Block 39, East Cameron area, from which point the line turns south and runs to the southeast corner of Block 87, East Cameron area.

Mr. Woodfin: That is 57, I believe, Mr. Examiner.

[196] The Witness: Is it? I can't read it very well.

That is correct. It runs to the southeast corner of Block 57, from which point the line turns east and runs to the southeast corner of Block 56, from which point the line turns north and runs to the southwest corner of Block 41, Vermilion area, from which point the line runs east and runs to the southeast corner of Block 49, Vermilion area, from which point the line turns north and runs to the southwest corner of Block 50, Vermilion area, from which point the line turns east and runs to the southeast corner of Block 50, Vermilion area, which is the termination point of the red line.

Mr. Russell: That is all I have, Mr. Examiner.

Thank you, Mr. Witmer.

Presiding Examiner: Lake Shore Pipe Line Company?

Mr. Ryan: Yes, sir.

By Mr. Ryan:

Q. Mr. Witmer, do you know of any additional amendments or supplements entered into between the applicants here and Tennessee, which relate in any way to the gas involved here? A. No, sir, I don't consider these, though, to be amendments.

Q. Do you know of any agreements entered into between the parties affecting the gas involved here? [197] A. No, sir.

Q. Would you consider these agreements affecting the gas involved in these proceedings? A. On the conditions set out in the agreements perhaps, yes, sir.

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William W. Witmer—Recalled—Cross

Q. Mr. Witmer, referring to transcript page 112, which is part of the agreement between Continental and Tennessee dated August 20th, 1956, there is reference there to the plant of Continental or Cities Service Refining Corporation in Lake Charles, Louisiana.

Is that, to your knowledge, a cycle plant or are there two plants? A. I don't know, Mr. Ryan.

Q. Would you be able to tell me what kind of plant or or plants they are? A. No, sir, I would not.

Q. Would you be able to point out on Exhibit 1 the location of Lake Charles, Louisiana, if it is indicated on that map? A. Well, I am certain if it is indicated on the map I can point to the name.

Q. Would you do that for me, please? A. May I have the map?

Q. Yes, sir. A. I don't see it indicated on the map, Mr. Ryan.

[198] Q. Is it within the areas shown on the map? A. I think it is.

Q. Do you have any idea approximately where it would be? A. It is approximately on the route of our proposed pipeline from the shore line to Kinder, Louisiana.

Q. Do I understand, Mr. Witmer, that Lake Charles is located approximately along Route 90 in Louisiana, U. S. Route 90? A. U. S. Route 90 goes through Lake Charles, yes, sir.

Q. That is the route which is referred to in the contract, is that correct? A. That is correct.

Q. Mr. Russell asked you some questions about the contract of August 20th, 1956 between Tennessee and Continental, which is in the record at pages 110 to 114.

I think perhaps this question ought to be asked of counsel for the applicants.

Mr. Russell: Are they of the opinion that in the event Continental exercises its option to construct the facilities under this contract, will these facilities not be subject to the jurisdiction of the Federal Power Commission?

Mr. Woodfin: Are we required to answer that question, your Honor? I don't see what our opinion in this matter will do in that respect, but if he wants a categorical [199] answer to it, my opinion is it would not be subject.

Mr. Ryan: That is exactly what I was after, Mr. Woodfin.

Mr. Geneau: Might I have the question reread?

Presiding Examiner: I don't think we need spend any time on that.

Hold your tape, Mr. Reporter, until the recess, and then read it to counsel.

By Mr. Ryan:

Q. Mr. Witmer, directing your attention to transcript page 115 and 116 and 117, there is contained there a letter agreement between Tennessee Gas Transmission Company and Continental Oil Company which relates to payment of gathering tax.

I am a little bit confused by that. I wonder if you could explain to me basically what tax Tennessee is going to have to pay to these producers? What is the amount of that tax? A. It amounts to one cent on a pressure base of 15.025 pounds per square inch absolute.

Q. And that is irrespective of whether these lands are eventually determined to be State of Louisiana lands or Federal Government lands, is that correct? A. Yes, sir, they are liable to either government for the one cent.

Q. Mr. Witmer, what are the take-or-pay-for provisions [200] of the contracts which are here involved, as far as Tennessee is concerned?

Mr. Littman: I object to that, Mr. Examiner. That is all set forth in the contracts.

Presiding Examiner: Is there any doubt in your mind about that?

Mr. Ryan: Yes, sir, there is.

I asked Mr. McKinley questions along this line, and he indicated to me that my assumption was incorrect, my assumption being that the take-or-pay-for is 80 percent. I am merely trying to find out if that is true or not.

Mr. Littman: I simply suggest if counsel has some matter or words or language of uncertainty in the contract he would like to have cleared up, why, I am sure the witness would be perfectly willing and glad to do it.

Presiding Examiner: I think it would be shorter to let the witness answer.

You may answer.

The Witness: I am a little confused. Should I summarize the provisions?

Presiding Examiner: No, no.

The Witness: Then, what is the question?

By Mr. Ryan:

Q. I will refer you to the provisions of the contract that I have in mind. [201] A. O. K.

Q. Paragraph 3 (ii), that should be 3-A (ii), and paragraph 3-D-3. A. Mr. Ryan, the Item (ii) of subsection A of Section 3, which I believe is the first provision you referred to, provides that the minimum quantity to be taken or if not taken to be paid for under this contract by Tennessee is on a reserve ratio basis, which is one million cubic feet per day for each eight billion cubic feet of original recoverable gas dedicated to Tennessee under this contract.

That commences or becomes effective on November 1, 1958, and provides, as I say, for the minimum take-or-pay-for quantity during the remainder of the term of the contract.

Now, Item 3 of subsection D of Section 3 has nothing to do with the take-or-pay, whatsoever.

Presiding Examiner: What would you expect to be taking or paying for under 3-A (ii) as of that time, November 1, 1958?

The Witness: If the original recoverable reserves remain exactly the same as they are now, or were at the time they were compiled or in work by Mr. Born, and as I recall they are equal to one trillion six hundred seventy-three billion, the minimum take-or-pay-for daily quantity under this contract would be 25 percent of 209 million feet [202] a day, the 25 percent representing this particular producer's share of the whole.

Back to Item 3 of subsection D of Section 3—well, let me say this: Subsection D has nothing to do with the take-or-pay-for provisions, whatever.

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William W. Witmer—Recalled—Cross

By Mr. Ryan:

Q. Subsection D does permit you to fluctuate from the minimums provided— A. I would like to finish my answer, Mr. Ryan.

Presiding Examiner: Finish your answer.

The Witness: As I stated, subsection D has nothing to do with the take-or-pay provisions but provides the maximum quantity Tennessee can call on the producers to furnish.

The maximum quantity may be any one of the three quantities or may be a quantity as determined by any one of the three items under subsection D, whichever one is applicable at the time.

So, there is a considerable swing in the contract between the minimum take-or-pay for quantity which Tennessee is obligated to take or pay for if it does not take, but which it has the right to make up later, and the quantity as determined by subsection D which is the maximum Tennessee can ask the producer to furnish.

By Mr. Ryan:

Q. Subsection D provides three alternatives, is that [203] correct? A. It provides three methods by which the maximum quantity may be determined, yes, sir.

Q. That is right. And the smallest of those is applicable, is that correct?

Presiding Examiner: That is stated in the contract.

The Witness: Yes, sir, that is correct.

Mr. Ryan: I am just establishing a predicate, Mr. Examiner.

By Mr. Ryan:

Q. Now, assuming that subsections 1 and 2 of subsection D were greater than subsection 3 of subsection D, then what would the range be between the minimum take-or-pay-for and the maximum takes which Tennessee could take? A. At what time during the term of the contract?

Q. From and after November 1, 1958. A. In that case, and in case the reserves are the same as they were at the time Mr. Born compiled his figures, the maximum quantity, assuming all those things, that Tennessee could get—

Q. I am seeking a ratio figure, Mr. Witmer. A. I am attempting to calculate it for you, Mr. Ryan.

Q. All right. A. Approximately 250 million feet a day at a pressure base of 14.73 psia.

[204] Q. And what is the ratio between the minimum figure which you just previously gave us and this maximum figure which you just now read?

Mr. Littman: I object to that. That is purely arithmetical.

Presiding Examiner: I think so.

Mr. Ryan: Your Honor, all I am trying to do is try to establish what the minimum take-or-pay-for is under this contract.

Presiding Examiner: Objection sustained.

By Mr. Ryan:

Q. Subject to check, Mr. Witmer, will you accept my computation that it is an 80-percent ratio? A. No, sir.

Q. Do you have any other opinion as to what it might be? A. As to what what might be?

Q. The ratio between those two figures. A. What two figures—

Mr. Littman: Mr. Examiner, I object—

Presiding Examiner: Objection sustained.

Mr. Ryan: He didn't even get the chance to object, Mr. Examiner.

Presiding Examiner: Yes, he did.

Mr. Littman: I am a fast objector.

[205] By Mr. Ryan:

Q. Did you negotiate the West Delta contracts for Tennessee? A. Yes, sir.

Q. Are you familiar with the provisions of those contracts? A. I don't have it before me. I negotiated the contract.

Q. Let me hand you a copy of the contract dated January 31st, 1956, between Tennessee and Continental for dedication of reserves from the West Delta area.

Referring to page 5 of that contract, Mr. Witmer, the top of the page, there is a paragraph No. 3 which is part of Section 3-D. Is that comparable to paragraph 3-D-3 of the contracts which are involved in this proceeding? A. Well, assuming this is the contract as you describe it, I would say yes.

Q. And does not the paragraph that I referred to in the West Delta contract provide for a greater take than does the comparable paragraph in the contracts involved in this proceeding?

Mr. Littman: Mr. Examiner, I object, unless counsel can indicate the relevance of this question. I fail to see it has any pertinence to the issue here. We have all kinds of contracts all over this southern, [206] southwestern—and they all have various provisions about who takes how much gas. I would like to know wherein it is relevant here.

Presiding Examiner: What is the purpose, counsel?

Mr. Ryan: Basically, Mr. Examiner, the purpose is to establish that the West Delta contract was entered into between Continental and the other three applicants here and Tennessee as buyer; it provides for the sale of offshore gas; it is the only contract I am aware of between these identical applicants and the identical purchaser for offshore gas.

I think it forms the basis for a very definite comparison of the terms and provisions of the contracts. I would show by it that outside of the price provisions, which in the West Delta area are considerably lower, there are basically no differences in the two contracts, except that the take-or-pay-for provision in the present contracts is higher than that in the West Delta contracts.

Mr. Littman: We are going to be here a long time if we are going to go through all the provisions of some other contract and compare it.

Mr. Ryan: I don't propose to go down all the provisions of the contract, Mr. Examiner.

Presiding Examiner: There was an objection made yesterday about the Commission's ruling as

to going into rate [207] features, the rate levels in certain proceedings.

Mr. Ryan: I very emphatically disagree with the conclusion that Mr. Foster drew, if that is what the Examiner has reference to. I think this Commission has, in fact, conditioned certificates issued to producers reducing the price. I think that is a sufficient answer.

Presiding Examiner: You are thinking of Signal Oil. But in that case, there was a question of holding the line.

Mr. Ryan: Mr. Examiner, we have maintained, we have stated that this price is higher than any price that we know of anywhere in the southwest area.

Presiding Examiner: Do you have Opinion 299 or 301 there?

Mr. Littman: Mr. Examiner, I have practically all of them here on this subject. I think one of the most—

Presiding Examiner: Which one are you referring to?

Mr. Littman: I was just about to read one small excerpt from Opinion 287, which I think epitomizes the Commission's holdings on this whole broad subject.

Presiding Examiner: Just a minute.

Mr. Ryan: Is that the Tamborello Decision, Mr. Littman?

Mr. Littman: Yes, sir.

Mr. Ryan: I thought we were referring to Signal Oil.

Mr. Littman: This is the general rule, as I understand it, to have been announced by the Commission, and it has adhered strictly to this rule throughout all the subsequent [208] cases, including Signal Oil, and it is this, and I quote page 5 of the Tamborello Case, Opinion 287.

First, the Commission said it had authority, it had the right to go into rate questions, to be sure, in certificate proceedings. It first said that, and then went on to say this:

"However, because the economic and other conditions presented in certificate cases filed by independent producers are substantially different from those presented in certificate applications filed by interstate pipe line companies, the Commission has not deemed it prudent to expend the time required to resolve rate issues at this stage, nor has it found it practical to inquire into the reasonableness of producer rates in all producer-certificate proceedings. In the order below, which we are adopting, paragraph I is a standard reservation over the Commission's unquestioned right under the Act upon its own motion or upon proper complaint to inquire later into the reasonableness of the rates proposed to be charged by the producers. Thus, the interests of the distribution companies and the consumers are protected against unlawful rates. At the same time, this procedure permits the more efficient and rapid handling of producer-certificate applications without the complicating considerations of the producer rates."

Now, the Commission has adhered strictly to this

rule, [209] right straight down the line with the possible—and has refrained from setting forth rate conditions in a certificate application with the single exception of the Signal Oil case, which case I submit is sui generis. It was a very unusual, very peculiar case, where the Commission found on the evidence that there was a complete disruption in the immediate area wherein other producers were selling gas, and a good deal of gas was being sold intrastate, and where there was shown to be a complete economic disruption of the pricing formulas in those areas.

Now, in that one special, specific, peculiar case, the Commission said that even then it was not going to fix what it would call a just and reasonable rate or make a final inquiry into a just and reasonable rate, but it would simply pare down that rate to its rates being charged in that immediate area.

Now, here, Mr. Examiner, as in the Natural Gas Pipe Line decision, which is the most recent one handed down, Opinion No. 299, the Commission pointed out that any possible effect on rates in other areas was immaterial.

Presiding Examiner: Where did it say that?

Mr. Littman: It said that in the Natural Gas Pipe Line decision. It said, and I quote, "these circumstances"—

Presiding Examiner: Where is that, counsel?

Mr. Littman: On page 17 of the mimeographed copy of [210] the Opinion 299, in the matter of Natural Gas Pipe Line Company of America, et al.

"Further, Oklahoma Natural"—I might say Okla-

homa Natural there was an intervener that was objecting to the granting of the certificate, one of the price conditions in the certificate.—

"Furthermore, Oklahoma Natural purchases its gas in Oklahoma, not in the areas in Texas covered by the contracts between Natural and its producers, and the prospect of price changes to Oklahoma Natural in consequence of the price proposed under Natural's producer contracts is too remote to be a matter of paramount concern in this case."

And in the most recent decision on this subject, in Houston Texas Gas and Oil Corporation—Coastal Transmission Corporation, Opinion No. 301, the Commission adhered to the view which I have expressed, namely, that it would not go into the matter of rate-making or rate-fixing in a certificate proceeding such as this.

Presiding Examiner: Could I see that?

Mr. Littman: Yes, I have all these opinions, Mr. Examiner. Do you mean the Houston case?

Presiding Examiner: Yes. I have Natural Gas Pipe.

Mr. Littman: Here is a petition—here is the order denying the petition for reconsideration in the Houston Texas—Coastal Transmission case.

[211] Presiding Examiner: Just a minute

Mr. Simons: Mr. Examiner, I would like to be heard on this.

Presiding Examiner: It may not be necessary. Just a minute.

Mr. Simons: I hope it is not, sir.

Presiding Examiner: I don't see anything in these opinions that goes to the question of what the effect will be on the consumer to be served from the source of supply.

The matters that I see in these opinions, just taking a quick look, relates to an objection made on behalf of consumers in other areas, as to what effect would be suffered by such consumers because of the effect in the field area of the proposed prices of gas to be served to an entirely different group of consumers.

Mr. Woodfin: Mr. Examiner—

Presiding Examiner: And there the question of remoteness was involved and also continuing supervision.

Mr. Littman: Let me answer that in this way: We have any number of cases. The Tamborello case I first cited and quoted from, Opinion No. 287, in that case various distribution companies served by the pipe line company involved in the case, namely, Transcontinental, and the Public Service Commission of the State of New York, advanced objections that the Commission should require the elimination from the [212] gas sales contracts of the producers, certain escalation clauses and deny the certificates unless the producers file and prove that their initial rates are just and reasonable.

Now, in that case, you had the same type of interveners, in fact, the same interveners in some respects as we have here.

Now, it is true in some of the other cases, the ones you just referred to, such as Coastal and the

Natural Gas Pipe Line case, there were involved in the first of the two I mentioned consumers who claimed they would be affected by price rises that would affect other pipe lines served by them.

But in the Tamborello case, which sets forth the general proposition which I quoted, had the identical type of interveners that we have here.

Presiding Examiner: I am not so sure about applying that authority here. But what is in my mind is that there is absolutely no suggestion on this record that Tennessee should not be permitted to take gas from these reservoirs.

The question is wholly one about price.

The Examiner has heard no suggestions—there has been no intimation made to him that there is pending any price increase by Tennessee to its consumers, based upon the cost of this gas. And even if there were such intimation, that issue would be decided in another case.

[213] Mr. Ryan: There couldn't be, Mr. Examiner. They haven't hooked up the gas. How are they going to charge their customers until they have started to take it?

Mr. Littman: It could be.

Mr. Ryan: The whole nub of our position in this case, Mr. Examiner, is this: we have made a contention that this gas is going to be a very sizable portion of Tennessee's gas supply. As such, it is going to have a very definite effect upon the customers and upon their rates.

Now, Tennessee has filed an application in G-11107, in which they have asked for authority to

hook up these reserves by building facilities out into the Gulf and to serve additional market requirements of their customers.

That docket is directly related to these dockets. Until that docket is heard, the customers cannot determine what the effect is going to be, we can't—we have no idea what the direct effect of these prices are going to be. We do know that the prices are higher than any prices being paid in the southwestern United States.

Presiding Examiner: And where does that lead you?

Mr. Ryan: It leads me into the Signal Oil decision, Mr. Examiner.

Presiding Examiner: No.

Where does that lead you here? Are you contending because of the price they should not be permitted to [214] get their gas?

Mr. Ryan: No, sir. I am contending they have not established their burden of proving that this price is justified.

Presiding Examiner: That is an entirely different proceeding.

The objection is sustained.

Mr. Ryan: Mr. Examiner, I don't want to transgress your Honor's ruling, I think that really goes to the very nub of our participation in this case.

Presiding Examiner: Very well.

Mr. Ryan: I would like to make an offer of proof.

I would like to have identified by reference to the Commission's files the West Delta contracts between

the C.A.T.C. group and Tennessee, which were a part of the proceeding in Docket Nos. G-9451, et al., their Exhibits 82-37, 82-38, 82-39, and 82-40.

Mr. Littman: I submit it is inappropriate for an intervener at this time to submit offers of proof or testimony. We are now engaged in the process of cross-examination.

Presiding Examiner: Objection sustained.

Mr. Ryan: Do I understand that the Examiner is denying my right to identify these contracts?

Presiding Examiner: Well, you have identified them. But this is not the proper place to entertain an offer of proof.

[215] Mr. Ryan: I asked that they be marked for identification, Mr. Examiner, as items by reference. That is my request.

Presiding Examiner: It is improper to interrupt the cross-examination of the witness at this time for that purpose.

Mr. Ryan: I will have to defer that.

May we have our recess, Mr. Examiner? I see it is 11:30.

Presiding Examiner: The hearing is recessed for ten minutes.

(Whereupon, at 11:25 a.m., a recess was taken to 11:35 a.m.)

[216] Presiding Examiner: The hearing will be in order. Counsel, do you want to complete your offer of proof?

Mr. Ryan: If I may be permitted to do so, yes, Your Honor. I ask to have identified these four

contracts by incorporation by reference to the Commission's files.

Presiding Examiner: Rule 1.28(b) provides that copies of such evidence may be marked for identification and made as an offer of proof. Do you have a copy of such contracts?

Mr. Ryan: Yes, I do. Actually, I don't think it is necessary to have identified all four copies of these contracts, because they are identical.

Presiding Examiner: Just a minute. I think this is a little out of order. I think we are getting ahead of ourselves. I suggested that we wouldn't interrupt the testimony of this witness at this time to take your evidence. We will take your evidence up later. We will mark it for identification at that time.

Mr. Ryan: My offer of proof is through this witness. I can't do it after he leaves the stand.

Presiding Examiner: How can that be? You asked to have them incorporated by reference.

Mr. Ryan: I would offer to prove through this witness that the contracts, except for the elements of price, take-or-pay-for provisions, and points of delivery, are in all material respects identical.

[217] Presiding Examiner: Now, then, what is the title of that document?

Mr. Ryan: The documents are entitled "Agreement Between Tennessee Gas Transmission Company", and the respective sellers of the gas who are involved here, Continental—

Presiding Examiner: Do you want to have all the documents marked?

Transcript of Hearing Held March 1, 1957 [Vol. II]
William W. Witmer—Recalled—Cross

Mr. Ryan: Maybe a preliminary question to this witness would prevent marking all four of them, just one would have to be marked.

Presiding Examiner: All right.

By Mr. Ryan:

Q. Mr. Witmer, are all four of the contracts entered into between Tennessee and the C.A.T.C. group in the West Delta area identical in all material respects?

Mr. Foster: Objection, Mr. Examiner.

Presiding Examiner: I will permit it.

The Witness: I don't recall. I don't think they are, though.

Mr. Ryan: Then I will ask to have marked for identification the four documents, Mr. Examiner.

The first one is an agreement between Tennessee Gas Transmission Company and Continental Oil Company, dated January 31, 1956, and it is Exhibit 82-37—

Presiding Examiner: I don't want that. Hand the document [218] to the reporter and the reporter will mark it Exhibit 3 for identification.

Mr. Ryan: I am asking that it be identified by reference to the Commission's files, Your Honor.

Presiding Examiner: You can't make an offer of proof under the Commission's rules by proceeding that way. You will have to give the reporter a copy of what is being excluded and have it marked for identification, and then that becomes your offer of proof.

(The document above referred to was marked Exhibit No. 3 for identification.)

Mr. Ryan: I ask that there next be marked for identification an agreement entered into on the 31st of January between Tennessee Gas Transmission Company and The Atlantic Refining Company.

Presiding Examiner: Exhibit 4 for identification.

(The document above referred to was marked Exhibit No. 4 for identification.)

Mr. Ryan: I ask that there next be marked for identification an agreement between Tennessee Gas Transmission Company and Tidewater Associated Oil Company, I believe the name of that company has been changed to Tidewater Oil Company, dated 31st day of January, 1956.

Presiding Examiner: Exhibit 5 for identification.

(The document above referred to was marked Exhibit No. 5 [219] for identification.)

Mr. Ryan: Finally I ask that there be marked for identification an agreement entered into between Tennessee Gas Transmission Company and Cities Service Production Company, dated the 31st of January, 1956.

Presiding Examiner: Exhibit 6 for identification.

(The document above referred to was marked Exhibit No. 6 for identification.)

Mr. Ryan: At this point, Mr. Examiner, I will ask the witness if he negotiated and executed these contracts on behalf of Tennessee Gas Transmission Company.

The Witness: Yes, sir.

Mr. Ryan: I offer these exhibits—

Presiding Examiner: Hold your offer until we get to the call on you for your evidence.

Mr. Ryan: Your Honor, I am proposing them through this witness.

Presiding Examiner: That doesn't make any difference. I will rule on them when your turn comes to offer.

Mr. Ryan: Your Honor has ruled on an objection which, it seems to me, goes to the very heart of one of the basic questions in this proceeding; that is, the question of price. And in order that I will not transgress Your Honor's ruling, I would like to see if I fully understand the ruling.

Is Your Honor ruling that the issue of price is in no wise [220] involved in this proceeding?

Presiding Examiner: I am not making any general rulings. I am ruling on specific objections.

Mr. Ryan: All right. I will just have to pursue this.

By Mr. Ryan:

Q. Mr. Witmer, what is the price provided in the West Delta contracts between the C.A.T.C. groups and Tennessee?

Presiding Examiner: That is covered by the previous objection and ruling. The witness need not answer.

Mr. Ryan: May I ask the Examiner if he will clarify the ruling for me so that I will not be forced to keep asking these questions? Could we have

it read from the record? I am just not clear as to what the ruling is.

Presiding Examiner: The reporter's tape is gone, Counsel. You proceed and I will hear another objection and then we will formulate the ruling that way.

By Mr. Ryan:

Q. Mr. Witmer, can you tell me what differences there are between the West Delta contracts between Tennessee and these C.A.T.C. producers, and the contracts which are involved in this proceeding?

Mr. Littman: I object to that, Mr. Examiner. I don't see any relevance to that question. Here is an area 200 miles away from what we are talking about here and what is involved here. If this is relevant, he has the right to go into practically [221] every contract in Texas, maybe Oaklahoma and everywhere else, and Louisiana.

Mr. Foster: As an additional point to which I would like to invite Your Honor's attention in this record: The matter which counsel seeks to inquire into is obviously beyond the scope of any direct examination. That is not the sole point I make, but the predicate for the principal point, which is this: Obviously counsel for the interveners are seeking to elicit on cross-examination outside the scope of direct a basis upon which to predicate their own affirmative case. In other words, a burden of proof rests upon the intervener in any effort it chooses to make to attack the sufficiency of the showing already made by the applicants when

the point sought to be made by intervener is not one encompassed by the scope of direct of the applicants and not one relating to any issue posed presently by the affirmative case made on direct by the applicants.

In other words, Mr. Examiner, it is apparent that counsel for the interveners seeks to get into questions either of one of two sources, one as to justness or reasonableness of the rates involved in this case, and the Commission has in its most recent ruling on this point, in an order issued January 31, 1957, in the Natural Gas Pipe Line Company of America, Docket No. G-4280, et al., and, Mr. Examiner, this is the same group of proceedings to which Mr. Littman referred, where the Commission [222] issued its Opinion No. 299.

I will read only just one part of the order to which I referred, denying applications for rehearing with respect to that opinion. It is as follows, appearing on page 5 of the Commission's mimeographed order:

"With respect to the contention that the producers' rates have not been shown to be just and reasonable, a requirement said to be imposed by Section 7(e) of the Act, suffices to comment without entering into any lengthly discussion of this question that, as we stated in our Opinion No. 288, and accompanying order, in the matters of Cities Service Gas Company, et al., Docket No. G-2569, et al., issued November 28, 1956, 'a proceeding of this nature can not and is not intended to take the

place of a proceeding under Sections 4 or 5 of the Act.'"

Now, the Commission was there quoting from the very case which I understand Mr. Ryan to refer to in his effort to inject into this proceeding a question which has no basis and no place. And exactly as Mr. Littman points out, there has been no showing made here by applicant with respect to the comparability of the size of the gas reserves involved, or that the sales to which he refers are in this area.

In fact, on the contrary, as Mr. Littman points out, the sales to which Mr. Ryan refers are many, many miles away, and it is obvious and clear that the issues which he seeks to raise have no relevancy and no place in this proceeding.

[223] He has a direct burden to prove any allegations that he wishes to make with respect to comparability. There is no predicate laid and it is outside the scope of the record.

Presiding Examiner: What is your answer to that, counsel?

Mr. Ryan: My answer is if you desire to rule as Mr. Foster has suggested, that this issue has no place in this proceeding, I would be willing to stand on that. If Your Honor does not rule on that, then I submit we have a perfect right to go into these questions.

Presiding Examiner: The objection stated by counsel for Atlantic and Cities Service is sustained.

Mr. Geneau: May Staff ask one thing in that connection, Mr. Examiner? At least it is the Staff's

understanding or present position that the West Delta gas is relevant to this proceeding only insofar as Section 3-J of the instant contract is involved, but with respect to its relevancy on the lawfulness or the reasonableness of rates of the price of gas to be paid in this proceeding, that it would not be relevant.

Presiding Examiner: That is correct.

Mr. Foster: Is that the position of the Staff, do I understand, Mr. Geneau?

Mr. Geneau: At the present time, yes, Mr. Foster.

Presiding Examiner: I am only going so far as to say that the ruling should be understood to apply to the lawfulness and the reasonableness of the rates as an issue here.

[224] Mr. Simons: You will recall that I requested also to be heard on this issue. These have been Mr. Ryan's questions. But I take it you said you were only ruling on specific objections.

Now, when my turn comes to cross-examination, I propose to get to the same issue. I assume there will be objections then and if you would rather take them as they come, that would be all right, too.

Presiding Examiner: I would rather do it that way.

Mr. Ryan: I didn't understand your last statement about justness and reasonableness of the prices, Mr. Examiner. I have not made any contention that these prices have to be proved to be just and reasonable. Our contention—that is, within the meaning of Sections 4 and 5 of the Act. Our

contention is that the applicants have the burden of proving that these are justified. Now what shape or form that evidence takes, I don't know.

Presiding Examiner: What is justified?

Mr. Ryan: That the prices are justified.

Presiding Examiner: That is what I understood.

Mr. Ryan: That the prices have been justified, not within the meaning of Sections 4 or 5, the prices here are higher than any other prices being paid in the southwest part of the country.

Presiding Examiner: The Examiner understood that counsel's objection went to that, and the ruling was on that basis.

[225] By Mr. Ryan:

Q. What is the size of the West Delta reserves, Mr. Witmer, dedicated to Tennessee? A. I don't recall exactly, Mr. Ryan.

Q. I refer to you Section 1-C of Exhibit 3, for identification. A. You have referred me. Now what do you want? This is not the size of the reserves, if that is what you mean.

Q. The dedicated reserves was my question, dedicated reserves to Tennessee. A. The dedicated reserves to Tennessee that were proven, I mean that are proven and recoverable are not the figure as shown in subsection "C" of Section 1 of this contract, whatever this contract is.

I don't recall. I do know they are considerably smaller than the dedicated reserves involved in this consolidated proceedings and, of course, all that is a matter of record in our case where we put those in.

Transcript of Hearing Held March 1, 1957 [Vol. II]
William W. Witmer—Recalled—Cross

Q. You said whatever this contract is. Is that a contract between Tennessee and Continental Oil Company, dated January 31, 1956? A. Yes.

Q. Did you sign that contract for Tennessee? A. Yes.

Q. Do I understand, Mr. Witmer, that Tennessee has con- [226] structed the facilities for the West Delta contract?

Mr. Woodfin: Mr. Examiner, might I object to this line of questioning unless Mr. Ryan wants to state that it goes to the question which was involved in the supplying of certain quantities of gas per day from the off-shore area.

Despite the Examiner's ruling, Mr. Ryan seem to be going right down the same path that he has intended to follow here. This is not a certificate proceeding involving West Delta. This is a certificate proceeding involving West Cameron, East Cameron and Vermilion areas, some two hundred miles to the west of West Delta. We have taken an interminable period of time this morning on that.

Presiding Examiner: What is your answer to that, counsel?

Mr. Ryan: Mr. Examiner, my answer to that is that all matters with respect to the West Delta contracts are relevant to this proceeding. I would prove that they are comparable and that—

Presiding Examiner: For what purpose?

Mr. Ryan: For the purpose of showing the similarities and differences in the contracts, with questions justifying the price and every other element of the public convenience and necessity. These applicants here have proved nothing, they put on

one witness yesterday who didn't know anything about these contracts.

Presiding Examiner: The objection is sustained.

[227] By Mr. Ryan:

Q. Mr. Witmer, I believe you testified yesterday as to the average cost of gas to Tennessee in the event these reserves are attached, and in the event that they are not attached; is that not correct? A. Yes, sir, I did.

Q. I would like to explore the manner in which you determined that. Did you yourself make a deliverability study of reserves to determine what the price would be? A. No, sir.

Q. Did somebody in your company do it? A. Yes, sir.

Q. How many deliverability studies were made? A. I don't know.

Q. You are then testifying to a figure which somebody else supplied to you? You don't know the basis for that figure; is that correct? A. I didn't say that, Mr. Ryan.

Q. Do you know the basis for that figure? A. Yes, sir.

Q. Would you explain to me, in determining the average price of Tennessee gas in the year 1958, what volumes of gas you determined would not be taken if the C.A.T.C. reserves were taken, and from where those volumes would not be taken? A. May I have the question read back?

[228] Presiding Examiner: Yes.

(Question read.)

Mr. Littman: I object to that, Mr. Examiner That is wholly unintelligible, as far as I am concerned.

Presiding Examiner: The objection is overruled.

The Witness: Mr. Ryan, the buying pattern that the deliverability study showed—

Transcript of Hearing Held March 1, 1957 [Vol. II]
William W. Witmer—Recalled—Cross

By Mr. Ryan:

Q. What deliverability study are you referring to? A. The same one you referred to.

Presiding Examiner: Let's not get into a controversy.

The Witness: There is only one.

Presiding Examiner: All right. Answer the question.

The Witness: I used one deliverability study—

Presiding Examiner: You started off by stating the buying pattern determined by the deliverability study. Did what?

The Witness: Including the taking of gas from the applicants in these proceedings under these contracts that are the subject of these proceedings, and I am a little confused as to your question, but there was no curtailments of deliveries elsewhere due to the taking of the gas that is the subject of this proceeding in that deliverability study.

By Mr. Ryan:

Q. In other words, you just added these—in determining what the average cost would be without these reserves, without [229] these C.A.T.C. reserves, you just subtracted the daily volume shown on the deliverability study to come up with a figure? A. I don't know whether I can answer that yes or no, or not. The deliverability study, as appears in our exhibits in Docket G-11107, is the deliverability study that I used.

Now, it includes takes from the gas reserves which are the subject of this proceeding. Now, I am confused,

frankly, Mr. Ryan, as to what gas you are referring to that I may have subtracted. I don't understand that part of your question.

Q. Well, you made two assumptions, did you not; one, that you would take the C.A.T.C. gas; two, that you would not take the C.A.T.C. gas? A. That is correct.

Q. Based on those two assumptions, you came up with two different costs of gas to Tennessee, on an average basis? A. Yes, sir.

Q. Now, I want to know: In determining what the average cost would be if you did not take the C.A.T.C. gas, how you determined that; on what figures did you determine that? A. On the figures in that deliverability study.

Q. Did you merely subtract the volumes which— A. Wait—

Q. Let me finish. Did you merely subtract the volumes which are shown on that deliverability study as being taken from these C.A.T.C. reserves? [230] A. Yes, sir.

Q. You did not substitute any other gas in place of that? A. No, sir.

Q. In other words, you assumed that your market requirements would go down? A. I didn't assume anything. That is the way I did it.

Q. In connection with determining your average cost of gas, Mr. Witmer, did you do any study as to the effect upon the customers of the construction of the $16 million worth of gathering facilities that you testified to? A. That is out of my province, Mr. Ryan. I did not.

Mr. Littman: I didn't get the answer. May I have it read, please?

Presiding Examiner: Yes.
(Answer read.)

By Mr. Ryan:

Q. And in determining the cost of facilities which you testified to, am I correct in assuming that you included cost of facilities in the Gulf leading to the nine platforms which are presently constructed by the applicants? A. Yes, sir.

Q. You did not take into consideration the other two platforms which testimony has shown will probably be built, or may be built? [231] A. No, sir, they are not productive yet, nor are they even built.

Q. Mr. Russell asked you some questions about Section 3-J of the contracts of these proceedings. I would like to get it clear: Am I correct in assuming that if gas is delivered from these reserves in lieu of gas from the West Delta area, that the price to be charged for that gas will be the price charged under these contracts?

Mr. Littman: Just a minute, I object to that, Mr. Examiner. The witness has made it very clear that there is no gas being delivered in lieu of the Delta gas. He said it would be in addition to the Delta gas.

Mr. Ryan: That is completely contrary to the evidence, Mr. Examiner.

Presiding Examiner: The witness may take the question.

The Witness: I would like to answer your question this way, Mr. Ryan: All of the gas dedicated to Tennessee under these contracts will eventually be delivered under these contracts and all of the

gas dedicated to Tennessee under the West Delta contracts will eventually be delivered under the West Delta contracts, and the prices paid for the gas delivered in each area will be that provided in each of the contracts.

Mr. Ryan: May I have the last addition to that answer read, please?

Presiding Examiner: Yes.

[232] (Answer read.)

Mr. Ryan: I am still not completely clear.

Mr. Woodfin: Mr. Examiner—

Presiding Examiner: Just a minute.

Mr. Ryan: Let me finish my question, Mr. Woodfin.

Presiding Examiner: Just a minute. Go ahead.

By Mr. Ryan:

Q. All of the gas delivered from acreage provided in the contracts which are the subject of these proceedings will be paid for at the price provided in these contracts; is that correct? A. Yes, sir; you mean the contracts that are the subject of these proceedings?

Q. That is right. A. Yes, sir, that is correct.

Q. And that is regardless of whether they are delivered under the original dedication provisions or additional dedication provisions or the provision under Section 3-J, with respect to the substitution of West Delta gas? A. Well, now, I don't know what you mean by additional dedication, and that sort of thing. Sir?

Q. Had you finished your answer? A. No, sir. I thought you had said something else.

The gas delivered under this contract, though, Mr. Ryan,

under the provisions of Subsection J of Section 3, will be paid [233] for by Tennessee according to the price schedule in this contract. Now, the gas which is not delivered at that time from the West Delta area, which is covered by the contracts between Tennessee and these applicants in that area, but which will be delivered later or during the term of the West Delta contracts, will be paid for by Tennessee at the rate provided in the West Delta contracts.

I can't make it any more clear, I don't believe.

Mr. Ryan: Mr. Examiner, I am completed with my cross-examination of this witness. I would at this time like to offer Exhibits 3, 4, 5 and 6 in evidence.

Presiding Examiner: We are still on cross-examination. Just hold your offer for a little bit, counsel.

Mr. Ryan: Will the Examiner please advise me at the appropriate time when I may offer these in evidence?

Presiding Examiner: When I call for evidence of the other parties, and you will be included. Public Service Electric and Gas Company.

By Mr. Kirby:

Q. Mr. Witmer, with respect to the gas that will be taken from the C.A.T.C. fields in lieu of the West Delta field, will there be a balancing of the gas at a later date so that the dollars come out the same? Is it a wash transaction, in other words? A. Yes, sir.

[234] Q. Now, you mentioned yesterday that there were five other companies in the area who were bidding

for this same gas. Now, was Tennessee the highest bidder? A. I don't know what the others bid, Mr. Kirby.

Q. Could you tell us what considerations you had to give in order to be the successful bidder, other than price, if there are any? A. Well, that is pretty complicated, but they are all embodied in the contract here. You see, it is not only price that is considered in these negotiations, but the terms of delivery and all the things that are involved. To list all of the considerations that passed from Tennessee to the producers, I just would have to go through every word of the contract, I suppose.

Q. No, I didn't mean that. A. You mean exceptional?

Q. Yes, the major considerations, such as, I suppose—let me give you an example on this: The platforms you had to construct; was that a major consideration in the bid? A. The platforms we construct? We have constructed no platforms, Mr. Kirby.

Q. Pardon me—to construct each of the platforms. A. Yes, sir, I would say that is a consideration, except I might explain there, Mr. Kirby, that out in the Gulf of Mexico I think it is probably the only practical way to make [235] the delivery arrangements, due to the fact that if the producer did not run through his separators, dehydrators, and so forth, and meters, on each of his platforms, I don't know how you would set the delivery up. I mean, it would be a little inconvenient to have the producers' lines tie into our lines 50 feet below the surface of the water somewhere.

I think, although it was a consideration, it is also the most practical means of delivering the gas to Tennessee.

Q. I thought initially the producers intended to build the gathering lines into the shore? Wasn't that the

initial arrangements? A. Between Tennessee and the producers?

Q. Yes, in your initial negotiations. A. No, sir, I don't recall anything like that.

Q. Then from the start of the negotiations you always intended to build the gathering lines out to the platforms? A. Yes, sir.

Q. And you don't know whether the other companies had any such conditions in their bid? A. I am not sure, but I imagine they felt very much as Tennessee, that after all, these are not the only producers in the off-shore play. Normally the company in the best position to buy additional reserves is the one who is located closest to them.

Now, you can't depend on these producers to build to you [236] all the time. So it is also, in a way, a pretty good idea to get where the gas is being discovered, you see.

Q. But you said yesterday, at the time that these negotiations were going on, they were the only producers who had a sizable package of reserves? A. For sale.

Q. For sale? A. Yes.

Q. So that there was no competition among suppliers at that time to sell the gas, to either you or to the other companies? A. You mean to sell gas in that same area?

Q. Yes, from the same area. A. No, sir, there sure wasn't. The competition was all between the buyers.

Q. Is Tennessee paying—withdraw that question, please.

In Docket G-8805, Tennessee received authorization to buy, and did buy, some 17-cent gas, and now they have filed a rate increase in which they are asking to increase their rates about $1 million to cover that gas. Now, with that in mind, may I ask you if you have made enough

investigations to determine whether or not the purchase of this gas will cause Tennessee to file another rate increase, in addition?

Mr. Littman: Mr. Examiner, I certainly want to express my disagreement with the premise of this question. I know of [237] no increase that has been filed as a result of the matters suggested by counsel. Other than that, I would have no objection to the witness answering the question.

Presiding Examiner: Very well. You may answer.

The Witness: May I have the question read back?

Presiding Examiner: Yes.

(Question read.)

Mr. Kirby: May I clarify it just one bit further. The docket I am referring to, wherein I stated they included that gas in the rate increase, is G-11980.

The Witness: I would say, Mr. Kirby, that that is really out of my province, but I would say that the initial price in this contract, by itself, would not cause Tennessee to file for a rate increase.

By Mr. Kirby:

Q. I think you have answered the question. But to make it more specific: Have you made any investigation which would allow you to come to that conclusion?

Mr. Littman: Just a minute. I object. First he gets his answer and then he tries to impeach him. I object to the question, I don't understand it.

Mr. Kirby: What I am trying to get is per-

fectly obvious, whether or not he made a study. He indicated in his answer he didn't make a sufficient one, but I wanted to clarify it.

Mr. Littman: He should have asked that question first [238] before he asked the $64,000 one.

Presiding Examiner: You may answer the question.

The Witness: I have made no detailed study of it. Incidentally, nor am I the person who decides whether Tennessee files a rate increase or not.

Presiding Examiner: I think there was some merit to that objection, counsel.

Mr. Kirby: Your Honor, if you will just have—

Presiding Examiner: I am not holding you to it, but I think you would have saved time if you would have asked first if he had made a study and he said no, and you would not have asked the other one. This way you asked two.

Mr. Kirby: May I have my questions read? I think it is perfectly clear that I did ask just that.

Presiding Examiner: No. I am just trying to save time.

Mr. Kirby: Well, we can look at the record.

Presiding Examiner: All right.

By Mr. Kirby:

Q. Is Tennessee Gas paying 21.4 cents to any other producers under any contract? A. At the present time?

Q. Yes. A. No, sir.

Q. Do you know of any contracts that have been certificated for the sale of gas in the Louisiana area and the Gulf [239] Coast area wherein the price is 21.4 cents? A. No, sir.

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Mr. Kirby: That is all. I have no further questions.

Presiding Examiner: New York Public Service Commission.

Mr. Simons: Before I commence my cross-examination, I would like to request from this witness his working papers, which underly his computation as to the effect on Tennessee Gas Transmission overall cost of gas, 1957 and 1958, of the volumes involved here.

Mr. Littman: We will take that request under advisement.

Mr. Simons: Then I can't cross-examine on it until I get it.

Presiding Examiner: I don't understand why you can't. I think you have to establish that you can not, first.

Mr. Simons: All right. Then I will go further. I would like specifically to request—

Mr. Woodfin: Mr. Examiner, I would like to make an objection on the record. I have seen this happen in hearings here many times, and it usually leads to interminable delays. But I would like for counsel to point to some rule or some case that, as a matter of right, entitles him to working papers.

Presiding Examiner: We don't have to get into that.

Mr. Woodfin: He is entitled to cross-examination of this witness, but not to delay this hearing on his demand that he be presented with some working papers.

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[240] Presiding Examiner: Very well. Proceed, counsel.

Mr. Simons: I would like to go one step further. I would like to request the Examiner to direct the witness to produce those working papers.

Presiding Examiner: The request is denied.

By Mr. Simons:

Q. Mr. Witmer, would you tell me how you arrived at the answer of 12.54 cents that you gave in response to a question by your counsel as being the cost of gas in 1957, excluding these purchases? A. Yes, sir. I was furnished the figure which represented Tennessee's average cost of gas without the C.A.T.C. gas included. That figure was derived from all the prices Tennessee pays for gas—.

Q. Just a moment. You were furnished that figure, did you say? A. Will you let me finish?

Presiding Examiner: Yes, proceed.

Mr. Simons: I want to know just what you said.

Presiding Examiner: Let the witness finish his answer.

Mr. Simons: I don't know what he is testifying from, from his own study.

Presiding Examiner: Let him finish and then you can ask.

The Witness: That figure was derived from all the total [241] costs of gas to Tennessee which I furnished to the person who added them up and divided them to obtain the average cost of gas figure. He and I, together, both then sat down and added in the quantities of gas from these applicants

and weighted the average and came up with the figures which I gave in direct testimony yesterday.

By Mr. Simons:

Q. Who is the person that you referred to? A. A Mr. McGee.

Q. What is his office? A. He is in our—I believe they call it Budget Section.

Q. What is he, an accountant? A. By profession, I think so.

Q. All right. Now, you gave him some figures; is that what you said? A. I furnish those people, Mr. Simons, with all of the individual costs of gas under every contract Tennessee has.

Q. What figures did you give him? Did you give him a sheet of paper? A. Yes. And then I check them from time to time on the sheets of paper that they work from.

Q. What does the sheet of paper show? A. What does it show? I don't have it.

Q. You don't have it? [242] A. I gave it to them.

Q. Do you know what volume—

Mr. Littman: Pardon me. May the witness finish his answer?

Presiding Examiner: Yes.

The Witness: It shows all of the prices that Tennessee pays in its various pricing areas and the volumes of gas that Tennessee expects to buy which are in turn taken from the deliverability study, which is done by someone else, the information for that which is also obtained from me.

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By Mr. Simons:

Q. You speak of pricing areas. What is a pricing area? A. Well, Mr. Simons, in our contracts in Texas we have various pricing areas. In other words, in our contracts they are defined by Railroad Commission districts; that is, areas that are set out and prescribed by the Railroad Commission of Texas, which is the administrative body in Texas which rules on the oil and gas conservation problems. Our contracts provide, then, that the clauses operating in those contracts will be effective only within the specified Railroad Commission district.

In Louisiana, rather than having districts—rather than using districts set out by some administrative body, our contracts in Louisiana are based on areas comprised of certain parishes enumerated in the contracts.

Q. How many pricing areas do you have in Louisiana? [243] A. Three.

Q. What are they? A. The Southwestern Louisiana pricing area is composed of some seven parishes, which I can't relate without looking at a map of the State. The Southeastern Louisiana pricing area is composed of either four or five parishes, and there is another pricing area in the Northwestern part of the State of Louisiana which is composed of several parishes.

Q. What is the price that you pay in your southwest Louisiana pricing area at the present time? A. As I testified before this morning, slightly in excess of ten cents at 15.025 p.s.i.a.

Q. And in southeast Louisiana? A. Seventeen cents at 15.025.

Q. And in northwest Louisiana? A. Twelve and a half

cents at 14.65. These may be approximate because of some tax adjustments, but that is about right.

Q. I was going to ask: did those include the one-cent Louisiana gathering tax? A. The ten-cent one does, the 17-cent does not, the 12½-cent one does not.

Q. So that to be comparable, they would be ten cents, 18 cents and 12½ cents, that is the price that Tennessee actually pays? A. No, that is not correct, because in some contracts we [244] don't refund the gathering tax.

Q. Could you explain to me, then, what the price is that Tennessee actually has to pay for the gas? A. Where?

Q. Well, let's take the southeast Louisiana where you said it is 17 cents. A. All right, sir. In that particular area it is 17 cents plus the one-cent gathering tax on 15.025 pressure base.

Q. And in the northwest Louisiana area, where you said it was 12.5 cents? A. Well, that actually is tied to an area in Texas, and that is where the 12½ cents comes from, and is the reason for the difference in pressure base, and as I recall at the moment, we don't refund the gathering tax for that particular gas. So it does not include it, nor does it—nor should it have added to it one cent.

Q. Now, in arriving at your 12.54 figure, could you tell me the volume of gas in Mcf and the dollars? A. No, sir, I don't have that here. All I have is the result.

Q. In arriving at the 12.71 cents figure, did you take whatever volume you had, whatever dollar figure you had, add in 175,000 a day for two months at what—what price? 22.4? A. Yes.

Q. And then divide? [245] A. Yes, sir.

Q. Now, how did you arrive at your 1958 figures? A. In the same manner, with the exception of the volume.

Q. Can you give me the volume and dollar figures? A. I don't have the dollar figures. The daily volume would be approximately 209 million a day on a pressure base of 14.73.

Q. You are speaking now of—the 209 million cubic feet is the additional volume that is coming from the C.A.T.C. contracts? A. Yes, sir.

Q. But you don't have the overall volume, for example, with relation to the 14.73 figure? A. No.

Q. Or the dollar figure? A. No.

Q. But whatever that was, you added approximately 209 million a day, plus the related 22.4 cents price, and that gave you your 13.7 cents; is that correct? A. It is not 22.4 at that pressure base, but at any rate converted to the correct pressure base.

Q. That is 209 million at what pressure base? A. 14.73.

Q. What is that at 15.025? A. Do you want me to work it out for you?

[246] Presiding Examiner: No, not on the stand.

The Witness: I don't know.

By Mr. Simons:

Q. On Page 51 of your testimony, if you will refer to that, please, you state, in response to a question by Mr. Littman that for the year 1958, the weighted average cost of gas for Tennessee, including the gas covered by these contracts, at approximately 240 million cubic feet per day on a pressure base of 14.73 p.s.i.a., is approximately 13.70 cents per Mcf.

Could you reconcile your statement as to the 209 million you just gave me and 240 million which appears on

page 51 of the transcript? A. Yes, I can. The 240 million is correct, the 209 million would be the minimum based on the reserves that are proven now, but on the deliverability study we intended to take 240 million a day during that year.

Q. Well, in arriving at your 13.7 figure, which did you use? A. The 240 million, that is the correct figure. It is the figure I should have given you a minute ago. I gave you, instead, the minimum figure under the contract.

Q. Coming back to quantity, again, Section 3 of the contract speaks of 175,000 Mcf a day from November 1, 1957, until November 1, 1958; is that not correct? A. Yes, sir.

[247] Q. What is the actual proposal, to take 175,000 in the last two months of this year, and then 240,000 beginning January 1, 1958? A. To the best of my recollection, that is what it is. I don't have the deliverability study in front of me, Mr. Simons. I am testifying strictly from memory.

Q. I wonder, sir, if you would turn to page 116 of the transcript. A. 116?

Q. Yes, sir.

I should like to direct your attention to the sentence which begins, following the colon on line 11 of that page, and runs through to line 15. I won't bother to read it in again, but my difficulty is with the meaning of the last line of that.

Is there some typographical error there? A. It is a little confusing to me, too. I don't know whether it is typographical or not.

Q. Well, this is a letter which you sent, from a letter

which you sent, is it not? A. Yes, it is from a letter that I sent.

Q. Could you check with the original letter and see if that is what it says? A. I don't have the original with me. But I might have a copy that might show it.

Q. A copy, all right. [248] A. There is something left out in the transcript, Mr. Simons. Shall I read the sentence as it appears in the original letter?

Q. Yes, if you would, please. A. "As long as the lands located in the disputed area, which are covered by leases dedicated to the contract, are considered to be Federal domain, the one cent (one cent) referred to above, insofar as such lands are concerned, should be paid by buyer to seller—".

Q. Just a moment, would you take that more slowly? A. I am sorry.

Q. Shall be paid. A. "shall be paid by buyer to seller under the contract as a payment equivalent to or equal to the last gas gathering tax."

Q. I think that that makes more sense. I would like to explore that just a bit, if I might.

Presiding Examiner: Could you put that off until after the luncheon recess?

Mr. Simons: Yes.

Presiding Examiner: The hearing is recessed to reconvene in this room at 2 p.m.

(Whereupon, at 12.32 p.m., a recess was taken to 2:00 p.m.)

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[249] 2:00 p.m.

AFTERNOON SESSION

Presiding Examiner: The hearing will be in order.

Whereupon, WILLIAM W. WITMER resumed the stand as a witness and, having been previously duly sworn, was examined and testified further as follows:

Cross-examination (cont'd) by Mr. Simon:

Q. As I recall, Mr. Witmer, just before the noon recess we were on the middle of page 116 of the transcript of yesterday's hearing. You had indicated a correction on that.

Now, as that statement is corrected, as I understand it, if the lands located in the disputed area which are covered by the leases are considered to be federal domain, the one cent shall be paid by Tennessee to C.A.T.C. under the contract as a payment equivalent to the Louisiana Gas gathering tax.

Now, what happens to it when C.A.T.C. gets it? Do they pay the one-cent tax? I do not understand what is meant by "equivalent to". A. Mr. Simons, it is my understanding, and I have been shown the provisions that refer to it, that the Federal Government, in effect, has done this: they have told these producers that if the leases are determined to be federal, they will have to pay the Federal Government the one-cent [250] equivalent to the Louisiana gas gathering tax. And if they turn out to be Louisiana State lands, then of course they are liable to Louisiana for the one-cent as a gathering tax.

So, I think the producers find themselves in this position, that no matter which the leases turn out to belong to, they are liable for this one-cent payment, and to the best of my recollection the Federal Government has expressed it as being based on the Louisiana gas gathering tax.

I believe that is the term they used.

Q. In either instance, then, whether these lands are federal or state, Tennessee will be paying 22.4 cents for the gas and C.A.T.C. will be receiving 22.4, of which they will turn one cent over either to the state or to the Federal Government; is that correct? A. Yes, sir, that is correct.

Q. With reference to these various letters which relate to the contract, could you explain to me why they are not part of the contract itself but why they are embodied in separate letters? A. Well, is my own estimation they are not part of the contract because they didn't affect any of the provisions of the contract. They were based on something outside the limits of the contract. For instance, the letter to which we just referred is purely an interpretation of something that is in the contract. One of the other letters, which is [251] from Tennessee addressed—well, I think there was a letter addressed to each of them, they are all exactly the same—dated the 14th day of August, 1956, which is another interpretation of the term "liquefiable hydrocarbon."

The one dated August 20th, 1956, which involves the pipe and so forth, was of course outside the limits of the contract, because it was an agreement concerning the furnishing of pipe and that sort of thing.

I just don't think any of them had to do with the actual terms of the purchase and sale; that is why they weren't included in there.

Q. You are the officer of Tennessee, Mr. Witmer, who is responsible for the purchase of gas, is that correct? A. Yes, sir.

Q. And in the course of your duties, do you keep advised of the prices which not only Tennessee is paying but which all other pipelines are paying, is that correct, in the areas in which you buy? A. Well, to the best of my ability.

Q. You would also keep yourself advised of Federal Power Commission action on such contracts, your contracts and other people's contracts? A. Yes.

Q. I believe you stated that you commenced negotiations that led up to the execution of these contracts in [252] October of 1955, the negotiations continued until August of 1956, is that correct? A. Yes, sir. Those negotiations included negotiations for gas in addition to this gas, also.

I mean, we were talking about several deals all at the same time.

But that was the first time that the gas that is the subject of the contracts in these proceedings was brought up.

Q. Now, the price you finally arrived at, the initial price, is the highest initial price in any Tennessee Gas Transmission purchase contract, is it not? A. At the present time, yes.

Q. And the particular step escalation provision is the steepest in any of Tennessee's present gas purchase contracts, is it not? A. Yes.

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Q. Do you know of any price being paid by any other interstate pipe line at an initial price higher than 21.4 cents in the southwest? A. I have heard of one but I am not sure whether it is in existence or not. I know quite a few of them at 20 cents and over, but they are for much smaller amounts of gas than covered by these contracts.

Q. But you don't know of any as high as 21.4 or higher. [253] A. I will put it this way: I haven't seen any contracts.

Q. Do you know of any step escalation provision in any contract between an interstate pipe line and a producer in the southwest which contains a step escalation as steep or steeper than the one contained in the contracts involved here? A. Yes, sir.

Q. What contract is that? A. I am not positive that my reference to which contract it is is correct, but I believe American-Louisiana has some contracts that go up, I think it is 4 mills a year—speaking from memory, now—and I know there are some that go up 2 mills a year.

Q. Your contract provides for an increase of 2 cents every four years, does it not? A. That is right.

Q. Which would work out to 5 mills a year. A. That is right.

Q. So that would be higher even— A. But under the ones that change each year, they get their money sooner.

Q. But less of it? A. Well, less in the total, perhaps. I don't know when you present-worth it back it would be more or not; I [254] haven't made that calculation. It would be pretty close.

Q. Aside from the timing aspect—and what I mean by that, whether you get it each year or whether you get

it at four-or five-year intervals—do you know of any step escalation provisions which would work out to as much as 5 mills a year? A. No.

Q. Could you tell me what the highest price presently being paid by Tennessee is for any gas in the southwest, other than the C.A.T.C. contract involved here? A. Seventeen cents plus the one-cent gathering tax at 15.025.

Q. At the time that you were negotiating, were you aware of this Commission's Signal Oil decision? A. I don't recall whether I was or not.

Q. Have you heard of it as of right now? A. I have heard of it, yes.

Q. You don't recall whether you were familiar with it at the time you were negotiating? A. That is right, I don't remember chronologically when I heard about the Signal decision, but it wouldn't have bothered me particularly, I suppose, even if I did remember it at that time, because this situation is too different from that.

Q. Did you seek the advice of company counsel as [255] to the applicability of the Signal Oil decision to the price you were proposing to pay in C.A.T.C.?

Mr. Littman: I object to that, Mr. Examiner. I don't think that is a material line of inquiry, as to how much law this witness might have studied before he closed this contract.

[256] Presiding Examiner: He may answer.

The Witness: I don't think I asked any company counsel, as you put it, about the applicability of the Signal case to this situation, since in this situation we went into a completely new area where no gas was being sold.

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By Mr. Simons:

Q. Then was it your opinion that Signal was not applicable? A. As I said, I don't remember right now whether at that time I knew what the Signal decision said or not, but if I had, it would have been my opinion that it wouldn't have been applicable in this case.

Q. But you don't recall actively thinking about it one way or the other?

Presiding Examiner: I think you are going too far in that question, counsel.

By Mr. Simons:

Q. We discussed this morning the pricing areas of Tennessee in southwest and southeast Louisiana. Could you give me the approximate volumes of gas presently being purchased in those two areas? A. No, sir, I wouldn't want to guess at that, and I would have to guess at it.

Q. Whatever those volumes were, they would have had to have been included in the computations which you gave on direct; [257] is that not correct—with reference to the '57 and '58 prices? A. Yes, that is correct.

Q. Now going back to the statement you gave on direct that the contracts in southwest and southeast Louisiana would not be triggered by the instant contract, did you obtain the opinion of company counsel on that? A. That is my own opinion.

Q. But in the event that there should be triggering, I take it that you are not waiving any right to have that included in Tennessee's cost of service in a rate case? A. I don't decide what goes into Tennessee's cost of service in a rate case. But as far as the gas purchase contracts are concerned, I am the company counsel.

Mr. Woodfin: May I have the last part of that answer read back, please?

Presiding Examiner: Yes.

(Answer read.)

By Mr. Simons:

Q. In your direct examination you stated that one of the advantages of this acquisition was that the reserves were well-located with reference to the Tennessee Gas Transmission system. Now, as I understand your testimony here, it is necessary for Tennessee to expend some $16 million to bring the gas involved here to dry land, and as I understand the application in 11107, Tennessee is proposing to spend some $85 million to construct a [258] pipeline, large diameter pipeline, from southeast Louisiana to Portland, Tennessee, to bring this gas, along with some other gas, perhaps, to its main line. Do you consider that that indicates that this gas is well-located with reference to the Tennessee system?

Mr. Littman: Mr. Examiner, I want to interpose an objection to that question, as counsel is clearly way off on his facts. The predicate for the question has no basis at all in fact, either in this record or in any other record. That is the basis for my objection.

I don't mind if he would ask this witness whether, in the light of the pending application in Docket G-11107, and in the light of what he has heretofore testified to, he would consider that to be well-located. That would be all right. But to go ahead and recite a lot of alleged facts that are way off base and erroneous, I don't want to just sit here and let a question like that go by.

Presiding Examiner: Let me have the question, please.

(Question read.)

Presiding Examiner: Objection sustained.

Mr. Simons: In view of that, I would like to inquire of counsel for Tennessee, who seems to have such a desire to help me frame my questions, just precisely where I was in error, since he alleged there was an error of fact in my question.

Presiding Examiner: You don't have to advise him. The [259] ruling was based on the $85 million factor, which was included in there without any qualification whatever.

Mr. Simons: All right, thank you very much, Mr. Examiner.

Presiding Examiner: Yes.

By Mr. Simons:

Q. Are you familiar with the application in G-11107, Mr. Witmer? A. Yes.

Q. Are you familiar with the fact that in that proceeding Tennessee proposes to build a large diameter pipeline from southeastern Louisiana to Portland, Tennessee?

Presiding Examiner: I don't see that bringing that in, as you are doing it, has any relevancy whatever.

Mr. Simons: Mr. Examiner, this witness—

Presiding Examiner: If they got gas, if the gas was available anywhere, in Texas, Louisiana or even Mississippi, some of that 85 million would still be necessary. But you are including the whole 85.

Mr. Simons: This witness says it is well-located with reference to the Tennessee system.

Presiding Examiner: All right. You can cross-examine him on that.

By Mr. Simons:

Q. When you said the Tennessee system, were you including the pipeline which has not been built and not been certificated [260] in G-11107? A. I am including the Tennessee system.

Q. Is that in the Tennessee system? A. Not yet.

Presiding Examiner: What do you mean by "system"?

The Witness: I mean the Tennessee facilities as they exist now, Mr. Examiner. In other words, when I said that, I mean it is better located there than it would be in Texas, where it would have to be hauled farther, or in the southeastern part of Louisiana, where it would have to be hauled farther also.

Incidentally, you are in error in the figures you quoted. The $16 million puts this gas to Tennessee's main line, not to the shore line. I don't know what proportion of the 85 million would be attributable to this gas or some other gas. There is other gas in that docket.

By Mr. Simons:

Q. What facilities do you have at Kinder, Louisiana? A. I don't know what all facilities we have there. We have a large compressor there, and part of the main line comes through there. Several other lines from Louisiana and Texas focus into that point.

Q. And is that the system you meant that it is located close to? A. That is where most of our gas starts out of the pro- [261] ducing States and going to the north, or at least a large portion of it, I would say probably yes, that is probably the system I had reference to.

Presiding Examiner: Is the what?

The Witness: Is the part of the system I had reference to.

By Mr. Simons:

Q. Do you know what the purpose of the 30-inch line from southeastern Louisiana to Portland, Tennessee, which is proposed in 11107, is?

Mr. Woodfin: Mr. Examiner, might I interpose this objection: There are some of us here that are concerned solely with these gas contracts. Mr. Simons, on behalf of the New York Commission, I am sure, is concerned with the whole Tennessee system. I would suggest that he save those questions for 11107, and not clutter this record with this information and these questions, which I can not, for the life of me, see the materiality of, what would be in this docket to the end of the line from southeastern Louisiana to Kinder, Louisiana, 30-inch line, which doesn't even cover the area proposed here.

Mr. Littman: I join in that objection. Counsel simply got up ahead of me.

Mr. Simons: Maybe I can shorten this. Are counsel for the applicants willing to have the certificate that is issued in this proceeding conditioned upon the issuance of the certificate in 11107?

[262] Mr. Woodfin: The answer to that is no. The answer to that is we have applied for an independent producers certificate to sell gas under these contracts. Now, we can't try 11107 here.

Mr. Simons: I was not asking you to, Mr. Woodfin.

Presiding Examiner: Let's go on.

Mr. Simons: Then in response to either the statement or objection, or whatever it was, it would seem to me that the issuance of a certificate here will seriously prejudice whatever position we would have in 11107, which is going to relate to the cost of gas as it winds up in the Tennessee system north of Portland, Tennessee.

Presiding Examiner: Let's get on, counsel.

Mr. Simons: I believe I have a question pending.

Presiding Examiner: Read the question.

(Question read.)

Presiding Examiner: Answer the question.

The Witness: The purpose is to haul gas from Louisiana to Portland, Tennessee. I couldn't give you a flow diagram showing which gas would go into that, or anything like that, Mr. Simons, I don't know that.

By Mr. Simons:

Q. As a general matter and as a matter of your general familiarity with the application, isn't it a fact that a large proportion of the gas which will go through that line is the [263] gas that is involved in this proceeding? A. Yes.

Presiding Examiner: Or any other gas that you get in Louisiana or Texas, in place of it?

The Witness: Well, sir, I don't know which gas is going through which line when it leaves Louisiana.

Presiding Examiner: If you didn't get this gas from off-shore Louisiana, where would you get it; you would get it from some point south of Kinder, wouldn't you?

The Witness: Yes.

Presiding Examiner: You still would have to have a proportionate sized line for the proportion of gas that you would get from it, wouldn't you?

The Witness: Yes.

Presiding Examiner: We are just wasting time.

The Witness: Some gas would go through it, I don't know which gas it would be.

Mr. Simons: I don't feel we are wasting time, Mr. Examiner.

Presiding Examiner: I am sure of it.

By Mr. Simons:

Q. Have you made any effort to compute the cost of gas to Tennessee on dry land? A. I don't understand your question, Mr. Simons. Could you rephrase it a little bit?

Q. I take it that in determining what price you are going [264] to bid for different lots of gas, you would consider not only the price which you are paying at the wellhead, but the cost to Tennessee at the point of entry into the Tennessee system; am I correct in that assumption? A. Incrementally speaking, you mean?

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Q. No, on a per Mcf basis. A. Not exactly—

Q. Perhaps I could give you an illustration. I may not have made myself clear. A. All right.

Q. Suppose you had an offer on the part of some seller to sell you gas at 18 cents at Location "A"; you had another offer of another seller to sell you gas at Location "B" for 16 cents; would you not consider, in addition to those initial prices, the cost to you of bringing it to the nearest point on your system? In other words, if you determined that it would cost you, let us say, six cents per Mcf to bring that gas from Location "B" to your system, as compared, let's say, to one cent per Mcf to bring the 18-cent gas—

Presiding Examiner: I don't think you have to labor the point, I think it is so elementary the answer is yes.

Isn't the answer yes, Mr. Witness?

The Witness: But this gas will probably go through some facilities where other gas comes in, too, and I don't think I could separate it out as it would apply only to the gas that [265] we will take from these particular leases.

By Mr. Simons:

Q. Is other gas going to flow through the $16 million of facilities that we are talking about? A. Perhaps not, but all of this gas may not flow through that particular line. We have other lines in south Louisiana that might be connected with this line that you are talking about.

Presiding Examiner: He is talking about the line coming in from your off-shore points to your main line system.

The Witness: All right, sir.

Presiding Examiner: Now, in determining the advisability of purchasing gas, he is asking you whether you wouldn't add to the Mcf of the gas at the wellhead the Mcf cost of getting gas to your main line system before you made a decision, and the answer is "yes", isn't it?

The Witness: Yes, sir, that is right.

Mr. Simons: That is what my thought was, Your Honor.

The Witness: You are talking just about the line that comes to shore.

Mr. Simons: At the present time, yes.

The Witness: All right.

By Mr. Simons:

Q. Of course, I would include to your system also later, but right now I will limit it to that. Did you make any study [266] in attempting to evaluate this 21.4-cent price, or 22.4-cents, when you include the taxs, in order to compare it with gas that you purchased, let us say on dry land in Louisiana at the present time? A. I think, in connection with our design engineers, I did, yes.

Q. Could you tell me what the cost was? A. I don't recall.

Q. Would you go about it by taking the cost of the facilities and figuring the return, tax on the return, and the depreciation, applying that to the proposed cost of the facilities to get an annual cost, and then applying that to the annual volumes of Mcf to proceed through that line? A. Well, I suppose you could go about it that way, yes.

Q. Well, how would you go about it? A. Approximately in that fashion.

Q. Then would you attempt to add in the costs of transmitting the gas, whatever operating costs there might be? A. Yes.

Q. Do you have any estimate of the operating costs? A. No, sir, I don't.

Q. If someone were to attempt to do this from the information in the record, would the appropriate figure on the facilities be the $16 million figure that you gave yesterday? A. Yes, sir, that gets the gas to our system at Kinder, [267] Louisiana.

Q. And would you accept, subject to check, the figure of 3.15 cents per Mcf as being the figure for 240,000 Mcf a day, based on that $16 million figure for return, tax on return and depreciation, taken at the rates in Tennessee's latest rate filing? A. Would I accept that?

Q. Subject to check. A. No, sir.

Q. You would not? A. That is right.

Q. Did you obtain any advice from any other department in Tennessee as to the maximum price which Tennessee could pay for this gas? A. No, I don't recall any, Mr. Simons.

Q. You were given a more or less free hand? A. That is correct.

I would talk this situation over with all the departments that were affected by the purchase of any gas, as we always do, but—in other words, I wasn't told to go to 21.4 cents and quit, or anything like that.

Q. Then you were not directed to get the gas at any price? A. No, sir, I was not.

Q. It is possible that a price could have been demanded

[268] by C.A.T.C. which you would have rejected? A. certainly, yes, sir.

Q. Could you explain how the step escalation figure was arrived at? I take it this is the first time this particular step escalation provision appears in any Tennessee contract? A. Well, the difference being the amount, you mean, during the period?

Q. Yes, sir. A. Well, as to how it was arrived at, we felt that the exclusion—well, it was arrived at in this fashion: In weighing all the factors involved in negotiating the contract and the fact that the contract did not include what is normally called a favored-nations clause and a price redetermination clause, it was felt that we could afford to go that high on the step escalation in the negotiations for this gas.

Now, those things aren't arrived at separately and then just all put together. They are all looked at in light of all the other considerations past.

Q. In other words, if you had had a normal step escalation therein, you might have had to pay a higher initial price? A. That may be true, I don't know, but it is certainly a possibility. Or if some other consideration had been different, then perhaps the price would have to be different to compensate, either up or down, for whatever change there might have been in some other consideration in the whole deal, you [269] see.

Q. Just by way of illustration, the transportation of the amount which may be deducted out may be an example of one of the factors that would influence the initial price up or down? A. Frankly, that particular consideration didn't bother us so much, Mr. Simons, because the pipeline is designed so that we can take advantage of the flexibility that

we have in the takes, so we can take these maximum quantities under the contracts, if we so desire, if we need them.

Of course, a large per cent of the time we don't need the maximums under the contracts, and so actually what small volume those liquids in the vapor state might take up—and incidentally, this is very lean gas—probably is not really costing Tennessee anything. That consideration—that particular one, I mean, you singled that one out, and I just wanted to make you realize that that particular consideration we felt didn't cost Tennessee anything, although it might be a convenience to the producer.

Q. Or even of value to the producer? A. Perhaps. I don't know what they are going to do with the liquids, and I understand they don't know right now, either. So it may or may not be, depending on what they do.

Q. Coming back to the figures you gave for '57 and '8 in your direct testimony, excluding this contract, the figures [270] for the two years for 12.54 cents and 12.73 cents, respectively; are you able to state the reason for the increase? A. The reason for the increase from what to what?

Q. From 12.54 in 1957, to 12.73 in 1958, both excluding the contracts involved here. I take it, as I understood your statement, you were not giving any effect to any step escalation or other escalation provisions in any of your existing contracts in arriving at either of those prices? A. That is correct. Neither of those prices reflect any increase under any clause under existing contracts that we are taking gas under. That difference is due to gas which is being tied to the system at the present time in southeastern Louisiana, and the consequential shift in buying pattern on our supply system.

Q. In other words, you would propose in 1958 to take more of the southeast Louisiana gas at 18 cents than you are presently taking? A. Well, there is some that has not previously been physically hooked up to the system. We have been constructing the facilities to hook it up. Of course, as more of it is hooked up, it will affect the weighted average in that direction.

[271] Q. Now, coming back to one of these letter agreements,—I am not sure now just which one it is with reference to the pages here—it is the one which relates to the pipe which Tennessee buys being given to C.A.T.C. A. Yes.

Q. Is the practical effect of that letter such that if the various operations involved there are exercised, this project could go through as contemplated, notwithstanding the fact that Tennessee might not receive a certificate in 11107 until, let us say, December 31, 1957? A. Well, that is not quite right.

The practical effect of it is that in the event Continental or the producers here obtain the physical facilities, the pipe and the fittings and that sort of thing, from Tennessee to construct this system, in that event, then, Tennessee would have the right, I think, in my opinion, to come back in, as you say, as late as perhaps December 31, 1957.

It is my understanding, however, that they have their own pipe and they have certainly given no indication to me that they want our pipe. So I don't know what—what I was trying to say is they haven't done either one.

Q. If they do take your pipe, do they pay you for it? A. Do they pay me for it?

Q. Tennessee. [272] A. Well, either me or the mill. I don't know whether it will be pipe that is actually on the ground right this minute or whether it will be shifted to a mill—

Q. But Tennessee would not pay for it? A. That is correct.

Of course, if we came back in, then we would buy the system back at the cost—

Q. Yes, I appreciate that. A. We don't get it free.

Q. You seldom get anything free. A. Yes, sir, that is right.

Mr. Simons: I think that is all I have, Mr. Witmer. Thank you.

Presiding Examiner: Staff Counsel?

Mr. Geneau: Yes, Mr. Examiner, a few questions.

By Mr. Geneau:

Q. Mr. Witmer, directing your attention to Section 4-B of the contract which is on page 8, in essence, that section provides for the dedication of additional gas reserves in the East Cameron, West Cameron, and Vermilion areas before August 1st, 1957.

Have any such dedications been made to date under this provision? A. No, sir, there have not.

Q. Are any contemplated in the near future or expected, [273] that you know of? A. I don't know, Mr. Geneau, whether any are or not.

Q. And if such reserves are dedicated, is it your understanding that the parties will respectively seek from the Commission the authority necessary to sell this gas and/or

to construct and operate the facilities necessary to take it? A. Well,—

Mr. Littman: I object to that, Mr. Examiner. I object to the portion of it that asks this witness to state what the producers will do in that event.

I think he can only speak for Tennessee.

Mr. Geneau: He can speak for his understanding of the provision, can he not, Mr. Examiner, and that is all I am after.

Presiding Examiner: The same question came up yesterday and the Examiner sustained the objection.

The objection is sustained again.

By Mr. Geneau:

Q. As to Tennessee, Mr. Witmer, excluding the applicants? A. I don't know, to tell you the truth, I hadn't even thought about that. That would have to be decided at the time it came up.

Q. Yet you thought about it at the time you drafted [274] that particular provision, did you not, Mr. Witmer?

Mr. Littman: Let me interrupt. It might save time.

I will simply say this, that Tennessee will apply for any and all authority that is necessary to be applied for in that event. Right at the moment, frankly, I am not prepared to say whether it would require an additional certificate. If no additional facilities are required, I don't know.

But whatever is required by the law and the Commission's rules and regulations, you can rest assured that Tennessee will comply as it always has in the past.

Mr. Geneau: That is satisfactory.

Mr. Foster: Mr. Examiner, lest the record might be subject to misconstruction through an absence of a statement at this point, Mr. Littman's statement would apply thoroughly in the case of Atlantic and Cities Service.

Mr. Woodfin: Well, we are all going to join the party. I will say this, Mr. Examiner, as a lawyer, I have no idea, I am just like Mr. Littman, I would have to wait and see if a certificate is needed. But if one is required, we certainly would make the application.

Mr. Voight: Sir, that applies to Continental, also.

By Mr. Geneau:

Q. Mr. Witmer, if I hadn't been overruled, I would have asked you the same thing in connection with Section [275] 4-C, and then I would have gone on to Section 4-D, and asked you why a provision concerning the obtaining of necessary certificates, if necessary, are lacking as to 4-D but were not lacking as to the two prior sections, and asked if that was just a mere oversight, perhaps. A. I would say probably just a mere oversight, if it is required to be in there.

Q. Section 5 of the contract, Mr. Witmer, provides for the initial determination of recoverable gas in place dedicated to these contracts.

Does Exhibit No. 2 purport to be this initial determination? A. Is that Mr. Born's exhibit?

Well, Section 5-A or subsection A of Section 5 provides for an agreement between the parties as to the amount of reserves.

Exhibit 2 is Mr. Born's interpretation of what the present proven recoverable reserves are. It does not amount to an agreement, as such, between Mr. Born and the other parties to these contracts.

Q. Let me reframe my question, then, Mr. Witmer. A. All right.

Q. As far as Tennessee is concerned as of this time no such determination has been made? A. We have made our determination but there has been [276] no formal agreement with the producers as to what they think is in place there. I can only refer you to Mr. Born, and he says he is in substantial agreement with them.

Q. But until such time as both Tennessee and the applicants agree to some figure, no such figure has been determined? A. That is correct, sir. Yes.

Q. In connection with Section 8 of the contract, Mr. Witmer, which is on page 15, I believe, under subsection C in the very last sentence, a minimum pressure of 700 pounds per square inch gauge is provided.

Could you enlighten me as to how or why that particular figure was arrived at, or derived? A. Yes, sir.

Since the system required to gather this gas will be under water, and since some of the fields closer in that may be connected to this system during the term of this agreement might, through some reason or another, become depleted to a lower pressure sooner than those farther out, to a great degree, or, on the converse if some of them farther out may become depleted first down to a lower pressure, this was provided so that the system could still be taking gas from those areas as long as it could make the 700 pounds per square inch gauge.

That was quite a bone of contention in the negotiations

[277] because you can't build an accretion station out there in the water somewhere, and we went through all sorts of gymnastics trying to arrive at how to do this thing.

Q. Is that figure in any way related, say, to the dew point which would be involved in connection with this gas that would be transmitted through this line? A. No, sir, it is not.

If I may, I would like to clear up something about that.

Q. Certainly. A. This gas will be—necessarily has to be separated on the platform so that the water can be knocked out. Now, when I say "separated," I mean the condensate or the distillate taken out.

Unless cold temperature separation is used, it will then have to be put through a dehydrator to extract the water down to the quality specifications, as included in Section 7 of the contract.

The only practical way to then deliver the gas is to measure the gas or meter the gas on the platform when it is dry.

Then, if Tennessee, according to the provisions of this contract, is to haul that condensate or distillate to shore, then it will be recombined with the gas stream after the gas has been metered and will go back into the vapor state and just be hauled along with the gas as just a little [278] more gas.

Now, it so happens that this gas is very lean and the amount of vapor that will result from the re-introducing of that liquid phase back into the system, into the line after the gas has been measured dry, is going to be very minor.

As I stated before, they haven't decided yet whether to even put it back in there or not; that is up to the producer, of course, as is provided in the contract.

Regardless, though, the 700 pounds has nothing to do with the dew point. They still have to get the gas and deliver it to Tennessee at the same quality as is provided in all of Tennessee's other contracts. And in the event we do haul the liquids to shore and the producers re-extract some liquids from the stream, then all Tennessee has to pay for is the residue gas at the end of that plant. The gas will be re-metered at that point because that is the point where it will satisfy the quality specifications set out in Section 7 of the contract.

So, actually, there has been some misunderstanding about how the thing will practically operate. That is the way—that is the only way it can operate. I just want to make that clear for everybody's convenience.

Q. That cleared it up very nicely.

In terms of your thinking, Mr. Witmer, do you think [279] of the East Cameron, the leases located in the East Cameron area, the West Cameron area and the Vermilion area, as being separate fields? A. They are separate fields, yes, sir.

Q. They are definitely, then, three separate fields with which we are involved in these contracts? A. At least three, yes, sir.

Q. At least three? A. Additional drilling may prove otherwise, but that is the way it looks now. There may be more.

Q. And has Tennessee ever had occasion to transport gas from these three fields heretofore, to your knowledge?

A. No, sir, no one has ever transported any gas from these fields.

Q. And in terms of the area of this field, are they restricted to the leases that are shown on the maps which have been introduced in evidence here? A. Yes, sir, they are.

And this dedication—I know it is a little odd—actually, the dedication is limited here by four means: It is limited arealy by the lease lines; it is limited as to amount, at least the initial dedication is, up to the two trillion feet; it is limited by the reservoirs as indicated by the sand sections in the Exhibit A, and it is limited in the Vermilion area as to depth.

[280] Within those limits, as Mr. Born has testified, he now thinks there is 1,673,000,000,000 cubic feet of gas recoverable, dedicated to Tennessee.

As has been stated on the record, the additional gas necessary to make up two trillion feet, if found within those limits, will also be dedicated to Tennessee, automatically.

Additional gas, if found within or without those limits will fall under the various provisions of Section 4, and consequently may not ever be dedicated to Tennessee, or may, within those provisions.

Mr. Geneau: We have no further questions, Mr. Examiner.

Presiding Examiner: Are there further questions before redirect?

Mr. Ryan: I have a couple of questions, Mr. Examiner.

Transcript of Hearing Held March 1, 1957 [Vol. II]
William W. Witmer—Recalled—Cross

By Mr. Ryan:

Q. Mr. Witmer, in answer to a question from Mr. Simons, I believe you used the term "lean gas." Would you explain what you mean by that, please? A. Yes, sir. This particular gas is Miocene production. I think it is, at least in my experience, it seems to be fairly normal Miocene gas. When I say it is "lean", I mean that it has a particularly low distillate or condensate content. Based on what we have been able to find out, [281] the figures have varied all the way from 6 to 11 barrels per million cubic feet. But whether it be 6 or 11, both would indicate that it is very dry gas.

Also, the low temperature fractional analysis of the gas indicates how lean it is. For instance, the low temperature fractional analysis of gas in the largest field involved under these contracts is 94.68 percent methane, which leaves, of course, very little room for there to be anything else. Thirty-one-hundredths of one percent is carbon dioxide, and various others contained in the analysis are of relatively small percentages.

That is one reason why the hauling to shore of the distillate didn't bother Tennessee, because we realized that there was very little distillate in the stuff.

Q. That analysis that you referred to, is that an analysis that was made by the applicants in this case? A. I don't know who made it. I imagine some laboratory made it, Mr. Ryan. I just have a copy of the figures themselves. I don't know who made the thing.

Q. I was a little curious. I asked Mr. Born yesterday if he had seen any analysis, he being the geologist, and he said he had not. I presume this is something you

have seen that Mr. Born has not. A. Well, probably so. But I am not too surprised at that. He doesn't do exactly with the same—the people [282] he dealt with evidently didn't have it.

Q. You gave a figure of 6 to 11 barrels for so many million cubic feet. What was that again? A. That is correct.

Mr. Ryan: Would the reporter please read the question?

(Question read)

Presiding Examiner: What he is saying, it is 6 to 11 barrels per million cubic feet.

The Witness: I thought you asked me if that was what I said. Maybe I misunderstood your question.

Mr. Ryan: Could we read the question back, please?

Presiding Examiner: Let's not stop. Let's go on. It takes time for the reporter to find it and read it.

By Mr. Ryan:

Q. How many feet involved in the 6 to 11 barrels, that is my question. A. One million cubic feet.

Q. What is that? A. One million cubic feet.

Q. One million cubic feet. Where was this low-temperature fractional analysis taken from? What particular reservoir? A. As I stated, to the best of my knowledge, it was taken from the Block 192 field, which I think is the largest field involved here.

[283] Q. Any particular reservoir? A. I don't know which reservoir it was. As I said, it is all Miocene pro-

duction, Mr. Ryan, and it is going to be pretty much the same.

Q. It is one analysis of one sand? A. I don't know whether it is a combined analysis from the well or not. The well may have been dually-completed and flowing out of two sands; I don't know.

Q. Do you have any opinion what volumetric percentage of hydrocarbons can be extracted by the producers and still leave the gas at 1,000 Btu that is ultimately received by Tennessee? A. Well, Mr. Ryan, pure methane is less than 1,000 Btu's, I believe, as I recall.

Based on the analysis that I have just told you about—of course, it depends on what sort of processing they use, but even the most efficient one that I know of that would be economical, I don't see how they could recover as much as 5 percent of the stream.

In fact, I am sure they couldn't. Part of it, of course, is inert gases, carbon dioxide and things like that, which are no good to anybody.

So, to raise it to a thousand Btu's. they would have to leave some of the other hydrocarbons in there.

Q. Do you have— [284] A. So, I would say it would be less than 5 percent.

Q. Did you have a copy of this analysis when you entered into the contract for Tennessee? A. I don't recall when the first time was I saw the analysis, Mr. Ryan. We discussed about—I will rest you this far: We discussed how much distillate was in the gas and that sort of thing, of course, while negotiating the contract. Whether we had that particular analysis or not, I don't remember, but we did know about how much distillate was in the gas.

Q. Now, in answer to a question by Mr. Geneau, you

explained what would happen in metering the gas that Tennessee eventually got after extraction of the liquids.

Is there anything in the contract which spells out that procedure? A. Well, you have to read, perhaps, two or three parts of it in conjunction, but as it says, the gas to be delivered to Tennessee has to be of a certain quality, —one of the provisions of which will mean that this distillate has to be knocked out before it is even acceptable to Tennessee.

Certainly, in the light of that, we wouldn't have to pay on some volume that doesn't even meet the quality specifications of the contract, if you understand what I am driving at there.

[285] Q. No, I am afraid I don't. When you say "distillate knocked out," does that mean that Tennessee won't accept gas which is in excess of a thousand Btu's? A. No, sir. You can have gas way in excess of a thousand Btu's which might contain hydrocarbons which would not drop out under the conditions in your pipeline.

On the other hand, you might have gas a little over a thousand Btu's which would have hydrocarbons in it that might drop out under the conditions in your pipeline.

What I am saying is, that based on the composition of that gas, it is Miocene gas, somebody has to knock out this distillate before Tennessee, or for instance before it can get to Tennessee's Kinder compressor station.

If they didn't do it, Tennessee would have to do it, and the contract so says, that they will deliver gas to Tennessee that meets the quality specifications contained in Section 7, one of which says that it cannot contain any substance that might become separated from the gas in buyer's pipelines, and so forth.

Transcript of Hearing Held March 1, 1957 [Vol. II]
William W. Witmer—Recalled—Cross

Now, consequently, we then would pay on the metered gas as it leaves the separation or processing facilities. I don't know what kind of facilities they would install. That is up to them, you see. That certainly hasn't been decided, nor have they decided to re-inject these liquids for sure back into the gas.

[286] Q. Do you expect distillate will be taken out of the gas before it is put into Tennessee's facilities offshore? A. It has to be taken out to dehydrate it and meter it for lease purposes, yes, sir. You can't meter it with all that stuff in it.

Q. So, the distillate could be removed at the platform and the hydrocarbons from that stream could be removed on shore, isn't that correct? A. That is possible, I suppose, yes. As I say, they are going to be removed on the platform. You have to do that to dehydrate the gas so you can meter the gas, for the lease purposes. They have to know how much gas runs off each one of these leases, so they can ratio that back.

Q. As far as the hydrocarbons themselves are concerned, there is nothing in the quality specifications that require the removal of them, is there? A. What do you mean by "hydrocarbons"? This is all hydrocarbons.

Q. Well, the— A. Which portion of the gas stream do you mean?

Q. I am not completely sure I understand myself.

Mr. Woodfin: Mr. Examiner, I wonder if this is all necessary on the record? I think Mr. Witmer has explained very clearly that the only point I think which Mr. Ryan was trying to find out, is if Tennessee paid for the shrinkage.

[287] He said under no circumstances do they do that. Any other point seems to me to be laboring something immaterial in the record.

Mr. Ryan: I don't see anything in the contract which spells that out.

Presiding Examiner: You had one chance at cross-examination. This is a final opportunity for you to cross prior to redirect. You are supposed to confine your cross to matters that were developed after your cross-examination.

Mr. Ryan: I won't even press the question under the circumstances.

Presiding Examiner: All right.

Are there further questions before redirect?

Mr. Ryan: Yes, I have an additional question.

Presiding Examiner: All right.

By Mr. Ryan:

Q. You stated in answer to a question by Mr. Geneau, that you felt there were at least three fields involved in this. How did you use the term "fields"? A. What did I mean?

Q. Yes, sir. A. Separate structure is what I was probably—I didn't think at the time of the definition of it, but I think that is probably what I had in mind.

Q. How would they be broken down? [288] A. We usually have been referring to them, and I think Mr. Born also, as the Block 71 Field, 192 Field and 49 Field. I don't know whether the gas under Block 66 is in the same field or not. But that gas is committed to Tennessee by the Magnolia-Continental-Newmont group, and I don't know whether it is in the same reservoir or not.

Q. Do they have any necessary relation to the areas which are referred to as East Cameron, West Cameron and Vermilion? A. No, sir.

Mr. Ryan: That is all I have.

Presiding Examiner: Further questions before redirect?

Mr. Geneau: May I have one more there, Mr. Examiner?

By Mr. Geneau:

Q. You mentioned that the gas under Block 66 is dedicated by M.C.N. to Tennessee; all of it, or just— A. All of their interests.

Q. —or just C.A.T.C.'s interest in that? A. No, sir, M.C.N.'s interest is what I was referring to.

[289] Q. In other words, Tennessee will be buying gas from Continental as the operator and part of that gas will be gas belonging to M.C.N., is that what your understanding is? A. We will be buying gas from the M.C.N. people. I don't know whether it would run through Continental's facilities or not. I think Magnolia is the operator for the M.C.N. group. I believe that is correct.

Q. Is that gas included in these? A. No, sir. There was some question yesterday, Mr. Geneau, about what the relationship was there, and I just wanted to straighten that out.

Q. Surely. I thought you had reversed the situation from what is was yesterday. A. No, sir, no, sir.

Mr. Littman: While you are on that subject, may I make an inquiry with regard to that same matter?

Mr. Geneau: Certainly.

Mr. Ryan: Is this redirect?

Mr. Littman: I will defer it.

Presiding Examiner: Further questions prior to redirect? Apparently not. Redirect.

REDIRECT EXAMINATION

By Mr. Littman:

Q. I will ask the question I was about to ask with regard to the M.C.N. gas in Block 66. Is that reserve committed [290] now to Tennessee? A. Yes, sir, it is.

Q. Now, with regard to the matter of the transportation of the hydrocarbons that has been referred to, from time to time in your cross-examination and in Mr. McKinley's cross-examination, I think you stated that there was no charge being made, as such, to the four producers here involved for that transportation; do you recall that testimony? A. Yes, sir, I recall that.

Q. I think you also said recently this afternoon, in that connection, that it really wouldn't cost Tennessee anything to haul those hydrocarbons to shore. Will you please elaborate as to what you meant by that, and your reasons for that statement? A. Yes, sir. In negotiating these contracts, as in negotiating any contracts for the purchase of gas, we attempt to get a certain amount of flexibility in the takes. Then, of course, to utilize that maximum amount of gas that Tennessee would have the right to ask the producer to deliver, we provide the facilities to handle those quantities of gas.

Now, normally we are not depleting those dedicated reserves at the maximum rate. In fact, it would be

actually very seldom that we would be—well, it would be quite an emergency if we were depleting all the reserves dedicated to Tennessee at this maximum rate.

[291] Since we have this flexibility everywhere, the buying pattern varies accordingly. Now, we, in this design to haul this gas to Tennessee's system, of course, we have provided capacity to haul this maximum amount in case we do need it, and the maximum amounts that we have the right to ask for.

A certain amount of that, that capacity normally will not—well, it won't be in use normally. We won't be asking for the maximum amount. As I have stated, when I was talking about the analysis of this gas and how much distillate it contained, the amount of extractable hydrocarbons that we would be hauling to shore under this contract are almost nil, they would take up almost no space in the pipeline.

But to make a long story short, they would take up space that would normally be there anyway in the normal course of events. Consequently, we didn't feel that Tennessee was suffering any expense in hauling these so-called liquefiable hydrocarbons to shore for the benefit of these producers.

As I stated a moment ago, somebody, of course, has to take those liquefiable hydrocarbons that would drop out under the conditions in the pipeline and the compressor station that the gas has to pass through.

Q. Is the matter of the transportation of those hydrocarbons all a part of the consideration of the contract? Is that one of the considerations? A. Yes, I am sure that probably might be worth something, [292] I don't know what, to the producer, but we felt we were giving nothing

in granting that, but it was part of the consideration in making this whole overall deal.

Q. Some reference has been made from time to time throughout your cross-examination concerning the letter which is set forth starting on page 110 of the transcript, which gives the producers an option to construct the gathering system, the marine gathering system.

Now, first in that regard, is it your understanding that it is an option and not something that they are required to do one way or another? A. It is an option on the part of the producers, yes, sir, that is correct.

Q. Now, assuming that Tennessee or the producers were unable to obtain satisfactory certificates within the meaning of that term as used in the contract by April 1, 1957, is there any avenue that you know of that would be open to these producers to construct the gathering system without exercising that option, and thereby—and in that way terminate these four contracts that have been designated Items "A" to "D", inclusive? A. Of course, all they have to do is—well, they can build the facilities themselves or even not build them at all. Of course, they can do what they will with their gas, if the satisfactory certificates are not obtained by that time. The [293] only time that Tennessee would have a chance to have its time to obtain a satisfactory certificate extended would be if the producers decided to build the system themselves and borrowed the pipe—not borrowed, but obtained the pipe and all the other facilities from Tennessee to do so.

Q. In other words, the option is related to—is connected up with the obtaining by the producers of the pipe from Tennessee with which to build the facilities?

A. Yes, sir. If they get their pipe from any other source, whatever it might be, then, of course, they can cancel the contract on the 2nd of April, providing these satisfactory certificates have not been issued, and there is nothing Tennessee can do about it.

They have no obligation to get their pipe from Tennessee, and as I have stated, it is my understanding they have pipe to build this job, and did have when we first started negotiating with them.

Q. Well, to button the matter up, would you say that the letter option which we have been talking about, does that in any manner lessen the need, in your estimation, of the urgency of Tennessee and these producers to obtain certificates by the time specified in the contracts? A. No. Of course, as I said, if the certificates are not obtained by the 1st of April, the contract is cancelable, just as it provides. And the only way that it might be extended [294] is if they happen to get the pipe from Tennessee.

Q. I don't want to go into the details of the prices that everyone is paying everywhere in the southwestern part of the U. S., but there hase been some questions and answers on this record that I think need some additional explanations to complete the story.

First, mention has been made about a 17-cents price which Tennessee is paying to these same producers, these same four producers here involved in the so-called West Delta area, which is, as I understand it, an off-shore area; right? A. Yes, sir.

Q. Now, is there any gas now being sold in that area, in that West Delta area, at prices in excess of 17 cents? A. In the area encompassed by our contracts, where we pay the 17 cents, Texas Gas pays 20—

Q. By "Texas Gas", give the full name of the company.
A. Texas Gas Transmission Company.
Q. That is one of Mr. Ryan's clients. All right.

Mr. Ryan: Mr. Examiner, I object to that. Mr. Littman, if you can't keep your tongue—

Presiding Examiner: Come to order, counsel.

Mr. Ryan: That is completely improper and out of order.

Presiding Examiner: It was not.

Mr. Ryan: It certainly was.

Mr. Littman: It must have hit a tender nerve.

[295] Presiding Examiner: Go ahead, counsel.

The Witness: Southern Gas, out of Birmingham, has bought gas for 20¼ cents in this area.

Presiding Examiner: Who is that?

The Witness: Southern Natural. And as is the case in every new area where we have gone to obtain gas, and certainly as was the case in that area before we even got our pipeline built after we had contracted for large quantities of gas, there were, of course, other buyers in there who had leap-frogged their price. That happens everywhere, and I wouldn't be surprised if it happens in this off-shore area.

By Mr. Littman:

Q. I believe you mentioned in the course of your cross-examination that in the southern or southeastern portion of Louisiana, on-shore, on dry land, there are some prices that are higher than those that are being paid by Tennessee in those areas. What are those prices, what are the names of some of the larger companies paying them?

A. I think everybody is familiar with the fact that American Louisiana and United Fuel both have contracts that started out at 20 cents. I mentioned Texas Gas, Southern Natural. It is my understanding that there are some intrastate markets which are higher than Tennessee pays. Olin Gas, for instance, pays 20 cents in one spot that I know of. And all of those prices are for gas, for lesser reserves and certainly [296] lesser potential than that included under these contracts.

Q. And in those areas the wells start on dry ground and not as here, in some 90 feet of water; is that right?
A. Yes, sir, that is correct.

Q. Now, to conclude this particular line of inquiry, I want you to frankly state why you, as the negotiator for Tennessee of these four contracts, were willing to pay the 21-cent prices here involved for the gas, well knowing that you had entered into a contract with these same producers to pay 17 cents in the West Delta area, which is also an off-shore area.

Will you summarize those reasons?

Mr. Kirby: Mr. Examiner, I object to that, because on cross-examination I asked him the question as to what were the considerations that made him go into this 21 cents, and he said he would have to go through the whole contract. I don't think we should have it now after a luncheon recess when he has apparently been able to determine what his reasons are.

Mr. Littman: That isn't my question.

Presiding Examiner: Objection is overruled.

Mr. Ryan: I had not objected because I think

this whole line is fairly relevant, but it doesn't comport with the Examiner's rulings on my questions.

Presiding Examiner: I am not going back and argue my rulings with counsel just because he may not see the consistency. [297] The objection is overruled.

The Witness: What was the question? How was it worded?

Mr. Ryan: May we have the recess?

Presiding Examiner: We had better have the answer to the question first.

(Question read.)

The Witness: In the first place, this involved a considerably larger amount of gas reserves to Tennessee than did the contracts in the West Delta area. In addition, this gas, as I stated before, was certainly in my estimation better located on Tennessee's system, and certainly afforded a much larger potential for Tennessee to purchase large additional reserves in the future, which is, of course, one of the main concerns of any pipeline.

It also, of course, afforded Tennessee an entry into an area which was just now being developed, which seemed to have great promise, as far as the discovery and development of natural gas reserves is concerned.

The same facts must have been apparent to all the other pipelines in that whole area. In fact, one of them was bidding strongly for the gas that would have had to build 600 miles to get to it. Certainly I want to emphasize the point that this was

the only sizable package of gas for sale on the Gulf Coast.

In fact, as far as I know, it is probably the largest one particular batch of gas that has ever been sold under one deal [298] on the Gulf Coast. Its deliberability is good and it is just such, at the time and under the circumstances and the advantages it had to Tennessee, that it required or could command the price that we negotiated for.

By Mr. Littman:

Q. Did the fact that the price of the West Delta gas has risen to I believe some 20 cents, as you mentioned earlier, also enter into your deliberations? A. Well, of course, we knew—

Q. I mean price paid by others? A. Of course, we knew that we had already been leap-frogged in Louisiana. As I say, our price was leap-frogged twice before we got our initial system built in Louisiana. So actually we were hung from raising our price in that area. Those contracts contained favored-nation clauses, and so forth, and, of course, that is another reason that it behooved us to make this contract and go into a new area where we would not have to trigger any of Tennessee's existing clauses.

Also, at the time we bought the West Delta gas from these same producers, we were buying gas from other producers in that same area, and the price was established, and we bought as much as we could because we knew that somebody would be following right in our tracks buying up as much as they could at a higher price. It happens every time.

Transcript of Hearing Held March 1, 1957 [Vol. II]
William W. Witmer—Redirect

Q. As the negotiator for Tennessee, Mr. Witmer, did you [299] try as hard as you knew how to obtain the lowest possible price for Tennessee in these negotiations?

Mr. Kirby: I object, on the ground that that calls for a conclusion, Your Honor, that has to be determined from all the facts in the record.

Presiding Examiner: He is entitled to say it.

The Witness: As I stated, the negotiations for this gas started in October, 1955, and I attempted at first to buy this gas for 14 cents. There was no other gas for sale on the Gulf Coast, with the exception of this and the West Delta gas that amounted to anything, and to obtain any gas at all, well, you had to deal on this gas, that is all there happened to be at that particular time. I might add that is about all that at that time had been offered for sale since the Phillips decision, that were in any sizable amounts.

So we attempted to buy the gas for much lesser prices and we were unsuccessful at that. On the other hand, we think that the prices we have paid for this gas are certainly not out of line in consideration of circumstances at that time and now in consideration of the amounts of gas that we have now under contract.

Mr. Littman: Mr. Examiner, I see we have passed our usual recess. I may not have but a very few questions.

Mr. Woodfin: Pardon me, Mr. Littman. Before any further talk goes with respect to the recess, I am wondering if it [300] might be possible to push forward here and forego the recess for a little

while, unless it is absolutely demanded. Some of us have to get back to Texas and attend another hearing on Sunday. We are past four airplanes now, and about to miss the fifth one. If it is at all possible, I would like to try to conclude this proceeding.

Presiding Examiner: The Examiner has no intention of sitting beyond five o'clock.

Mr. Littman: I will forego my reference to the recess, Mr. Examiner, and I will say I have no further redirect.

Presiding Examiner: Are there further questions of the witness?

Mr. Ryan: Yes, I have a few.

Presiding Examiner: The hearing is recessed for five minutes.

(Whereupon, at 3:36 p.m., a recess was taken to 3:41 p.m.)

Presiding Examiner: The hearing will be in order.

Any further questions?

Mr. Geneau: I would like to state that the questions which Mr. Littman just put to Mr. Witmer concerning the other prices surrounding the gas surrounding the fields—or the gas in this instant proceeding, if that was put forth for the purpose of showing the justness or the reasonableness of the 21.4 price, then I object to that, but if those questions were put merely in connection with showing that this was the best [301] price or the only price at which Tennessee could obtain this gas, then I have no objection. I believe that would be consistent with your prior rulings.

Mr. Littman: If you would like to hear from me, Mr. Examiner, as to why I asked those questions—there was really nothing new in these questions, it was simply—as Your Honor will note—each one was predicated upon something that had been elicited during cross-examination.

I was simply trying to bring out the whole story for whatever purpose it might be. There were some questions that permeated through our objections, questions that got through, and I would be remiss in my duty had I not cleared up the record as I tried to do in by redirect examination.

Presiding Examiner: Very well.

Mr. Littman: That was my purpose. I had no motive of going into a full blown rate case hearing. I had no idea of going into the reasonableness of the rates, per se. But since rates in the area had crept into the record, I wanted the whole story told as to those particular rates. That was my purpose.

Presiding Examiner: Very well. Any further questions by counsel for Brooklyn Union and Long Island Lighting?

(No response.)

Presiding Examiner: Apparently not.

Lake Shore Pipe Line Company.

Mr. Ryan: Yes, Mr. Examiner.

[302] *Recross examination by Mr. Ryan:*

Q. Did I correctly understand you to say, Mr. Witmer, that there are pipelines who are paying 20 cents for gas in the West Delta area? A. No, sir. I said in the area

covered by our contracts, which include the West Delta contracts. The West Delta area, Mr. Ryan, is just a small area within that particular pricing area of Tennessee, you see. We buy gas along the Mississippi River Delta and the West Delta area is contiguous to the Delta, it sits right against it.

Q. Were you referring to gas purchase and sales contracts in Louisiana? A. Yes, sir.

Q. Strictly Louisiana? A. Well, yes, sir. I think the West Delta area is probably all within Louisiana, I am not sure it is, I imagine it is very close in.

Q. Were you referring to gas which is purchased on on-shore, as opposed to gas which is purchased off-shore? A. I was referring to both.

Q. What contracts were you referring to in the off-shore regions? A. Contracts which Southern Natural has with Phillips, for one. That is one I can think of right offhand.

[303] Is that the only one? A. I don't know who all they have contracted with. I think also with Magnolia. Let me see. Those are two that I can think of right offhand.

Q. Are those sales being presently made, to your knowledge? A. I don't know whether they have started deliveries under those contracts or not.

Q. Do you know whether certificates have been issued or not? A. No, I don't know.

Q. Do you know how long ago those contracts were entered into? A. No, I don't.

Q. Would it have been within the past year? A. You mean within 1956?

Q. Within 1956. A. Yes, sir. I suppose they would have. I think so.

Q. And you did not indicate that any of the prices were equal to or in excess of the price which is involved here. A. Oh, no.

Mr. Ryan: I believe that is all, Mr. Examiner.

Presiding Examiner: Public Service Electric and Gas.

Mr. Kirby: Just a very few, Mr. Examiner, please.

By Mr. Kirby:

[304] Q. On redirect-examination, Mr. Witmer, I think you said that you started in your negotiations on these contracts at 14 cents; am I right? A. Yes, sir, that is correct.

Q. And then negotiations continued. And you wound up with 21.4 cents. Now, you stated that the competition was keen; in fact, that you knew of one pipeline that was bidding strongly and he was 600 miles away, or it was 600 miles away; is that correct? A. Yes, sir.

Q. You stated, in answer to one of my questions earlier, that you did not know the prices that they had offered. Now, I would just like to know whether or not this bidding is under a sealed bid procedure, or did you have a general price range as you negotiated? A. I wouldn't say it was under what you would call a sealed bid procedure. I know just about what the other bidders bid, but it was all hearsay; I mean the way you find those things out and everything. So I would just as soon not go into that.

Q. All right. But you knew at the time, for example, as Mr. McKinley testified yesterday, that they had to get

their leases into production before 1958 or they would be in jeopardy, didn't you? A. They told me that, yes, sir.

[305] Q. I suppose that was public knowledge to everyone? A. I am sure it must have been.

Q. I gathered from your testimony, in answer to Mr. Littman's questions, that you were definitely, should I say, in a hard-put position in order to meet the competition to get this gas because you testified it was the only big batch of gas you could bid on; am I correct in that conclusion? A. Well, it was a competitive negotiation, yes. I don't know what you mean by this "hard-put".

Q. You were competing with the other interstate pipelines, the other five, to get this one large— A. Yes, we all wanted it, that is right.

Q. You all wanted it? A. Yes.

Q. The competition was solely between or among the interstate pipelines, that is clear, isn't it? A. What do you mean, solely among them?

Q. Well, there wasn't any competition by sellers to get you to take their gas, meaning Tennessee? A. Perhaps not of this particular package. There is always competition among producers to get their gas tied to the interstate lines. Of course, packages of this sort come along very seldom, but there is always that situation.

Q. You mentioned, in answer to another question of Mr. Littman's, that in one of your areas United Fuel was paying 20 [306] cents where you paid 17; is that correct? A. No, sir, where we pay ten.

Q. Where you pay ten? A. That is right.

Q. What was the time variation there? I mean did you have your ten-cent prices considerably, in time, before the 20 cents price? A. I have made ten-cent contracts since they made the 20-cent ones.

Q. You have? A. Yes, sir.
Q. In the same areas? A. Yes, sir.

Presiding Examiner: Is that United Fuel Gas?
The Witness: Yes, sir.
Presiding Examiner: Is that southeastern Louisiana.
The Witness: No, sir, southwestern Louisiana.
Presiding Examiner: What is in southeastern, American Louisiana?
The Witness: No, sir, Southern Natural and United and Texas Gas and Olin Gas.
Presiding Examiner: That is southeastern?
The Witness: Yes, sir.

By Mr. Kirby:

Q. And they were comparable 20-year contracts, I assume? [307] A. They were all 20-year contracts, yes, sir.

Mr. Woodfin: I want to interpose an objection at this point to the comparable 20-year contracts. You say they are 20-year contracts, but we are going to open this record up to a long discussion if we get into a consideration of the contracts which Mr. Witmer has made at ten cents in the pricing area where United Fuel bought gas for 20 cents, because it is simply not the situation.

You can't Erath for ten cents. I don't think anybody has bought Erath for ten cents. There is no sense getting on these big volumes of gas—

Mr. Kirby: This is an argument for the briefs, Mr. Examiner.

Presiding Examiner: All right, proceed.

Mr. Kirby: I thought there was an objection.

Presiding Examiner: The objection is overruled.

Mr. Kirby: I have no further questions.

Presiding Examiner Are there further questions of the witness?

Mr. Geneau: Possibly one, Mr. Examiner.

Presiding Examiner: Probably or possibly?

By Mr. Geneau:

Q. In connection with the negotiation of the price under these particular contracts, Mr. Witmer, I have heard it said that the perfect transaction is when both parties leave the [308] transaction feeling that he has cheated the other person. Is it Tennessee's feeling, after negotiating this contract, that it has cheated the applicants?

Mr. Ryan: I object to that question.

Presiding Examiner: The objection is sustained.

By Mr. Geneau:

Q. Do you think that Tennessee could have driven a harder bargain than they did drive?

Mr. Ryan: I object to that; that is repetitive.

Presiding Examiner: Counsel will stand when you make your objection.

I will permit the question.

The Witness: No, sir, I don't think we could have driven a harder bargain.

Mr. Geneau: No further questions.

Presiding Examiner: Are there further questions of the witness?

Mr. Woodfin: I have one question, Mr. Examiner.

Presiding Examiner: All right.

Transcript of Hearing Held March 1, 1957 [Vol. II]
William W. Witmer—Redirect

Further Redirect Examination by Mr. Woodfin:

Q. Mr. Witmer, when you stated you had bought gas in the southwestern Louisiana area for ten cents, did you mean to infer that you were buying any volumes of gas for any 10-cent contracts, or would you detail the types of contracts or volumes [309] which you have been able to purchase at a ten-cent level?

Mr. Kirby: I thought just a while ago that Mr. Woodfin was objecting to my going into a long discussion of these contracts. Now he is opening up the very same question.

Presiding Examiner: You many answer the question.

The Witness: Any place that you can still buy gas for ten cents today, Mr. Woodfin, it is either distress gas or you happen to be the only pipeline anywhere around it.

Mr. Woodfin: That is all.

Presiding Examiner: Anything further of the witness?

Mr. Ryan: Before the witness leaves the stand. Mr. Examiner, I wonder if the Examiner could tell me if it is appropriate for me to now move—

Presiding Examiner: I will call later for that.

Mr. Ryan: My proof is through this witness, Mr. Examiner, and I want to offer it before he leaves the stand. I have no witnesses to present.

Presiding Examiner: All right.

Are there further questions of the witness?

Mr. Kirby: One question in the light of further redirect, Your Honor, if I may, and that is this:

Transcript of Hearing Held March 1, 1957 [Vol. II]
William W. Witmer—Recross

Recross Examination by Mr. Kirby:

Q. When you said that the only ten-cent gas, and so forth, was distress gas, is that distress gas also 20-year [310] term gas, as I think I asked you before? A. Well, sometimes it is and sometimes it is not.

Mr. Kirby: All right.

Presiding Examiner: Further questions?

(No response.)

Presiding Examiner: Apparently not.

The witness is excused.

(Witness excused.)

Presiding Examiner: Does this complete the offer of each of the several applicants and the intervener Tennessee Gas Transmission Company?

Mr. Voight: If Your Honor please, we would like a ruling on whether or not the applications in these four dockets, which we consider to be our pleadings in this matter, are a part of the record.

Presiding Examiner: They are a part of the record, but they are not evidence. They do not speak in an evidentiary way.

Mr. Voight: In other words, they are in the record for evidence of the fact that they have been filed, and that is all?

Presiding Examiner: Oh, yes.

Have the offers of the several applicants and the intervener Tennessee Gas Transmission Company, have they been completed in this proceeding?

Mr. Voight: Continental Oil Company has completed its [311] presentation, sir.

Mr. Foster: That is likewise true of Atlantic and Cities Service, Mr. Examiner.

Mr. Woodfin: Tidewater has completed its testimony, it being understood that the testimony presented through Continental and Tennessee's witnesses are as well Tidewater's testimony.

Presiding Examiner: Very well.

Mr. Littman: Tennessee has completed its presentation, Mr. Examiner.

Presiding Examiner: Do any of the interveners, other interveners, desire to offer evidence?

Mr. Ryan: My hour has come.

I have previously had identified four contracts as Exhibits 3, 4, 5 and 6. I now offer them in evidence.

Mr. Littman: I think it has been indicated heretofore that we have objection to these exhibits. I will not elaborate. We stand on our objection.

Presiding Examiner: Unfortunately I am not too certain I am too clear on that objection.

Mr. Littman: Well, the objection was made earlier in this hearing by us to these several contracts, as having no particular bearing on the matter before Your Honor. These contracts deal with the purchase of gas by Tennessee from four producers in the so-called West Delta area. The witness has already testified and explained the differences in the price and what governed [312] Tennessee's judgment in the difference in the price, the difference in the time and the difference in the volumes of gas involved, and all those differences.

I just can't, for the life of me, see how the contracts for the purchase of gas in the West Delta area have any particular relevance to the issue at hand, any more so than any of the other contracts

that Tennessee has to purchase gas elsewhere in the U. S.

If these are relevant, certainly all the other contracts that we have would be relevant, and I am going to object to it for that reason.

Presiding Examiner: For what purpose do you offer these?

Mr. Ryan: Mr. Examiner, I think the exclusion of these exhibits would be perfectly consistent with Your Honor's previous rulings as to the questions I asked of Mr. Witmer. And I think, of course, that that ruling would be erroneous, respectfully.

However, in addition to the relevancy generally, which I previously explained, Mr. Littman has opened up the subject on redirect examination of comparable prices in the West Delta area. He specifically stated it was the West Delta area. Now, these contracts, except for very minor differences, are identical with the present contracts, the only differences being that Tennessee has less advantage under the present contracts, in matters other than price, than it does under the West Delta [313] contract.

They have a higher take-or-pay-for, they have to build two more delivery platforms, and the price is considerably higher.

Presiding Examiner: Looking at my notes of what happened this morning, you were interested in Paragraph 3, I think, Section 3-E, of the West Delta contracts, weren't you?

Mr. Ryan: That was a specific question that I asked, Your Honor, that is correct. As I recall,

the question was excluded, or at least the answer to the question was excluded, upon objection. That was only one question in a series which I had.

Presiding Examiner: The objection is sustained.

Mr. Kirby: May I join in Mr. Ryan's offer of these exhibits, offer of proof—

Presiding Examiner: You are in the proceeding, you will have the same benefit. It is understood you will have the same benefit.

Mr. Kirby: That is correct, but I would like to state this as a reason: In answer to Staff Counsel, Mr. Littman stated he wanted to talk about the other contracts so we would have the whole story, whatever it might be, and we want these in for the same reason.

Presiding Examiner: The objection is sustained, the offer is denied, the documents will not be received.

[314] (The documents heretofore marked Exhibits 3, 4, 5 and 6, for Identification, were rejected.)

Mr. Ryan: May I make an offer of proof, Mr. Examiner, that if these documents were received, they would show that the only basic differences in the contracts are the following—

Presiding Examiner: Just a minute. Under Rule 128(b), if the excluded evidence consists of evidence in documentary or written form, a copy of such evidence shall be marked for identification and shall constitute the offer of proof.

Mr. Ryan: I have re-handed the offered documents to the reporter and I understand they constitute the offer of proof.

Presiding Examiner: Counsel, there is only one question: I may have to call for additional copies, and if I do, I will advise you. I think under the rule it appears a single copy will be sufficient. If I have misinterpreted the rule, I will have to advise you.

Mr. Ryan: I understand also, Mr. Examiner, that these contracts constitute rate schedules of the producers which are on file with this Commission.

Presiding Examiner: Very well.

Is there any further evidence to be offered in this proceeding?

(No response.)

[315] Mr. Geneau: I wonder, Mr. Examiner, if I might clear up just one or two little technical mechanical errors that have come to our attention in the application of the applicants in this proceeding?

In the application of Continental Oil Company in Docket 11024, a copy of the contract of Continental with Tennessee is attached. In Exhibit A of that contract, Part 2 of Exhibit A, which is on page 5, at sand interval 7497 through 7591, opposite that is shown Well 72A-1. I should like to point out that the contracts of the other three applicants show that to be Well No. 72A-2.

Mr. Ryan: Is this Item A that you are referring to?

Mr. Voight: That is a typographical error, sir.

Mr. Geneau: And that the same error is made in my copy of Item A in this proceeding, which is the same contract in a different form.

Mr. Voight: That is a typographical error.

Mr. Geneau: Secondly, Mr. Examiner, in the application of Cities Service Production Company in Docket No. G-11046, to which is attached a copy of the contract, referring again to the sand intervals in Part 2 of Exhibit A to that contract, my copy of the application shows the sand interval 10594-10685.

I should like to point out that the other contracts show that second figure to be 10645. I should also like to [316] point out that Item B, which is the same contract which has been offered in evidence in this proceeding, has caught that particular error.

Mr. Ryan: Mr. Examiner, the application in this proceeding is not evidence in any respect. I don't know what relevancy it has that the application has a typographical error.

Mr. Geneau: The applications are on file with the Commission and will remain there, Mr. Examiner. If in the future, someone comes across that, it may cause a question in their minds; that is all.

Mr. Foster: May I state that I would suppose from the explanation given that that is a purely typographical error.

Presiding Examiner: Is there anything further to come before this hearing?

Mr. Woodfin: Mr. Examiner, on behalf of the independent producer applicants in this case, because of the urgency of the time interval involved as shown on the record in this case, we would move

to omit the intermediate decision procedure and request that the matter be presented on briefs to the Commission at as short a possible interval of time as might be fixed for the filing of contemporaneous briefs and then reply briefs to those.

We make that request in accordance with the applicable [317] rules and regulations of the Commission.

Mr. Littman: On behalf of Tennessee Gas Transmission Company, we join in that request.

Presiding Examiner: What is the position of the other participants with respect to the motion? First, the applicants?

Mr. Foster: Mr. Examiner, the motion was phrased as one made on behalf of all of the applicants, and we do concur, that is, Atlantic and Cities Service.

Presiding Examiner: Continental?

Mr. Voight: Yes, sir, it was made on behalf of Continental, also.

Presiding Examiner: The interveners Brooklyn Union Gas Company and Long Island Lighting?

(No response.)

Presiding Examiner: Lake Shore Company?

Mr. Ryan: We support the motion for omission of the intermediate decision procedure, Mr. Examiner.

Presiding Examiner: Public Service Electric and Gas Company?

Mr. Kirby: Mr. Examiner, I would make a suggestion that I think in a case as important as this, that the Commission should be entitled to the

time to investigate and evaluate the field study that they are talking about they are making or having made in their latest order that [318] they issued in the Champlin Oil and Refining Company, Docket No. G-9277, in which they say they are making a comparable field price study.

I think they should have the opportunity to take that. I would think that before stating my position on the motion that I should state that I would move that this record be held open until they could have that opportunity. It is some time in April they state they are going to have it ready.

Presiding Examiner: That is another motion.

What is your position with respect to the motion to omit?

Mr. Kirby: First, I want leave to make that motion. They might seem inconsistent. On the second phase, or rather the first motion, I will support the motion to omit the intermediate decision procedure of the applicants, but not on their grounds, your Honor, but on the ground that in the Tamborello case the Commission has stated that the question of price and the reasonableness of it in a certificate case for independent producers is a Commission decision.

Mr. Foster: I just wanted to be sure that Mr. Kirby knew, Mr. Examiner, that the Champlin Oil and Refining matter is set down for hearing commencing April 17, which is at least 17 days beyond the April 1 deadline facing the applicants in this case.

[319] Are you aware of that fact?

Mr. Kirby: Yes, but there are two other cases already started and the field price study will be available around April 1. I only cited that to acquaint the Examiner with the study being made in the Sinclair case right next door.

Mr. Foster: I think Mr. Kirby may not be aware of this, but I am familiar with the details on that, Mr. Examiner. It happens I represent Champlin. In the proceeding going on simultaneously with this one across the hall, it was developed on the record within the past two days that the field price study to which you refer will not be available for at least a month, I believe, or several weeks, I think was the exact phrasing used, beyond the expected April 1 date.

Mr. Kirby: Some time in April, they were supposed to let the Examiner in that case know the day, I believe.

Mr. Littman: Mr. Examiner, I should have stated along with my concurrence with the motion to dispense with the intermediate decision procedure that it seems obvious that with an April 1 deadline date staring us in the face, that it would be utterly physically impossible to go through the intermediate decision procedure with the usual 20 days allowed for the filing of exceptions and time to be allowed for the Commission to take action after the filing of a report, to say nothing, of course, of the time it would take, even if done in the most expeditious manner by the [320] Examiner. It would be just impossible, physically, to do that. And these applications in which we are so

very much interested, we would then run the risk of termination on April 1st.

Therefore, I wanted to state that that was our reason for asking that the intermediate decision procedure be dispensed with in this particular case.

Presiding Examiner: What is the position of Staff Counsel with respect to that?

Mr. Ryan: Before that, I would like to add to what Mr. Littman said, that we also think that it would be physically impossible in view of the fact that there would probably be exceptions filed to any decision of the Presiding Examiner to get this before the Commission in time for this April 1 deadline.

Presiding Examiner: What is the position of Staff Counsel?

Mr. Geneau: If there are no objections to the waiver of the intermediate decision procedure. Staff concurs with the motion to waive, Mr. Examiner.

Presiding Examiner: It appears that all parties of record present concur in such motion.

Mr. Woodfin: Mr. Examiner, in that event, as I understand the rule, we may presume that the intermediate decision procedure will be omitted unless we are otherwise [321] informed.

I would propose, Mr. Examiner, that the matter be handled by the filing of simultaneous briefs by applicants, staff and interveners, to be filed not later than Thursday next, with reply briefs the following Monday.

Mr. Ryan: It is physically impossible, Mr. Examiner.

Presiding Examiner: Is there any other suggestion as to dates?

Mr. Ryan: I am sure I will have, Mr. Examiner. Let me look at my calendar.

Mr. Littman: Mr. Examiner, in view of the shortness of this record and the limited issues involved in this proceeding, we think that would be a reasonable amount of time, and we concur in the suggestion.

Mr. Ryan: Mr. Examiner, we are not going to know in the first place until ten days from now whether the Commission has or has not omitted the intermediate decision procedure. That is just one factor.

Now, it may be that the record in this proceeding is only two days, but I think that the issues involved are fairly complex and they are very important. It is certainly going to take me a lot longer than five or six days to get a brief ready and in three days to get a reply brief.

Presiding Examiner: What time do you require?

Mr. Ryan: I would need at least two weeks to get an [322] initial brief and an additional week to get a reply brief. That would still leave the Commission time to decide the matter.

Mr. Geneau: The staff also needs more than a week on the first brief.

Presiding Examiner: What about ten days on the first brief and a week on the second?

Mr. Kirby: I certainly think in view of the fact

that I stated to Your Honor that I was going to request to have this record remain open long enough to get this field study in, that obviously to put down a briefing matter in ten days or something like that is not going to give anybody time enough to make any sense with regard to it.

Presiding Examiner: I suggest this: That if the intermediate decision procedure is omitted that you include in your brief any motions you might have with respect to the subject matter of field prices.

Mr. Kirby: Perhaps that is the best way to handle it.

Presiding Examiner: It being understood that the other parties would be satisfied to respond to that in their reply brief.

I think the rules give them—what is it?—eight days for a motion?

Mr. Kirby: Ten days, I think.

Presiding Examiner: That is the only way I see that [323] you can handle it.

Just a minute.

Mr. Littman: It is ten days, unless the Examiner sets a lesser time.

Mr. Kirby: That is correct.

Mr. Littman: I assure your Honor we could reply in seven days.

Presiding Examiner: I think the time could be safely set to coincide with the date of filing of the reply brief.

Is there any objection to filing simultaneous briefs?

Mr. Ryan: I have no objection, Mr. Examiner.

Presiding Examiner: The Examiner hears none.

On the matter of days, the 14th of March for the initial brief and the 20th of March for the reply brief.

Mr. Ryan: I think that the very least we can expect in this case is two weeks for the initial brief and one week for the reply brief, and that still leaves the Commission with ten days in which to act and still meet the deadline.

Presiding Examiner: You are suggesting the 14th and the 21st?

Mr. Ryan: I am suggesting the 15th and the 22nd, the 15th being two weeks from today and the 22nd being three weeks from today.

Mr. Littman: That only leaves eight days, as I see it, [324] for the Commission to decide this case. That isn't reasonable.

Presiding Examiner: I don't think—

Mr. Ryan: It is going to take me more than that period of time to get this brief ready. I have other commitments, Mr. Examiner. I am just not going to be able to do it in that time.

I think we are being perfectly reasonable by only asking for two weeks.

Mr. Kirby: Mr. Littman well knows extensions are certainly in order when you start a case this close to what they call their deadline. We know that this isn't true at all, that that is an absolute deadline.

All kinds of things could happen in there. Cer-

tainly, they would get extensions of these contracts if they are so important.

Mr. Voight: I think Staff Counsel will bear me out, if your Honor please, that repeatedly since the first filing of these matters early last September, the applicants have urged that this matter be set down for trial. Of course, if we had been set down for trial, our ten o'clock scholar wouldn't have gotten in last week. But I think Mr. Geneau will bear me out that not less than a dozen times we have, on different occasions, both personally and by telephone, we have urged that these matters be set down for hearing.

[325] Is that not right, Staff Counsel?

Mr. Geneau: That is so, Mr. Voight. However, others—

Mr. Voight: It was not our fault that we were delayed this long in getting started.

Presiding Examiner: I think the dates should be the 14th and the 21st.

Mr. Foster: 14th and 21st?

Presiding Examiner: Yes.

Mr. Ryan: I just want the record to show that I don't agree that that is long enough time in which to file our briefs.

Presiding Examiner: Very well.

Mr. Kirby: I make that observation, too, Mr. Examiner. I want to be noted as stating we do not have enough time because we may have to apply to your Honor for an extension.

Mr. Littman: I know of a case which ran for over a year and the Commission allowed the parties

ten days in which to file briefs because there was a deadline.

Presiding Examiner: Just a minute.

Proposed corrections to the transcript should be submitted on or before March the 8th, and in filing those, they shall be accompanied in each instance by a certificate of service by proposing counsel, stating that they have been served on all other participants in this proceeding. Objections to the proposed corrections submitted on or [326] before March 12th. The briefs will be filed simultaneously, the main briefs as previously stated on the 14th and the reply briefs on the 21st of March.

Subsection C (ii) of Section 1.30 of the Rules has been covered, as the Examiner construes it, by the discussion with respect to the filing of briefs.

With respect to subdivision C IV, the Examiner inquires whether the parties reserve only their rights to apply to the Commission for re-hearing and to petition for judicial review of the Commission's decision or order as may be provided for by the statute under which the proceeding was initiated and conducted?

Mr. Woodfin: We do, your Honor.

Mr. Foster: That is likewise correct with respect to Atlantic and Cities Service.

Mr. Voight: On behalf of Continental, yes, sir.

Mr. Littman: Yes, your Honor. We go along with that.

Mr. Ryan: The same applies to us, Mr. Examiner.

Presiding Examiner: The answer is yes?

Mr. Kirby: Yes.

Mr. Geneau: Yes, Mr. Examiner.

Presiding Examiner: The Examiner hears no response to the contrary.

Is there anything further to come before this hearing?

(No response)

[327] Presiding Examiner: Apparently not.

The hearing is now concluded.

(Whereupon, at 4:25 o'clock p.m., the hearing in the above-entitled matter was concluded.)

Errata Transcript, Approved March 15, 1957

[328] ERRATA TRANSCRIPT

The transcript of hearing in the above-entitled matter held February 28 and March 1, 1957 is hereby corrected as follows:

CORRECTIONS BY
THE ATLANTIC REFINING COMPANY
and
CITIES SERVICE PRODUCTION COMPANY

Page	Line	Correction
6	23	Change "7825" to "725"
67	25	Change the first "to" to "of"
114	18	Change "C Keuier" to "C. T. Klein"
116	14	After "paid" insert "by Buyer to Seller under the contract as a payment equivalent"
221	20	Change "sources" to "sorts"
222	7	Place a single quotation mark before "just" and one after the comma following "reasonable"
[329] 222	8	Insert "it" before "suffices"
222	9	Place a comma before "without"
222	10	Delete both commas, and insert a comma before "that"

CORRECTIONS BY
TENNESSEE GAS TRANSMISSION COMPANY

35	8	Insert "it" after the word "that"
57	7	Change "reasible" to "feasible"
143	24	Insert "hundred billion" after the word "six"

Errata Transcript, Approved March 15, 1957

Page	Line	Correction
144	7	Change "1,600,000,000" to "1,600,000,000,000"
144	11	Change "1,600,000,000" to "1,600,000,000,000"
146	25	Insert "a" after the word "purely"
154	21	Change "is not" to "are"
158	15	Change "lises" to "lists"
276	19	Change "sonner" to "sooner"
277	23	Change "re-dombined" to "re-combined"
281	25	Change "do" to "deal"
295	10	Change "their" to "our"

CORRECTIONS BY
THE BROOKLYN UNION GAS COMPANY
and
LONG ISLAND LIGHTING COMPANY

180	9	Change "contiguous" to "co-extensive"
181	23	Change "if" to "as"
198	19	Mr. Russell did not ask the question starting on line 19 and ending on line 22 and is unable to state which other counsel did.

[330]

CORRECTIONS BY
PUBLIC SERVICE ELECTRIC & GAS COMPANY

234	22	After "construct" insert "the pipeline facilities to"
318	4	Add at end of line "into consideration."
319	15	Change "know the day," to "know today,"

Errata Transcript, Approved March 15, 1957

CORRECTIONS BY
LAKE SHORE PIPE LINE CO.

Page	Line	Correction
43	22	Change "billion" to "million"
197	11	Change "cycle" to "single"
198	19	Change "Mr. Russell" to "Mr. Ryan"

CORRECTIONS BY
NEW YORK PUBLIC SERVICE COMMISSION

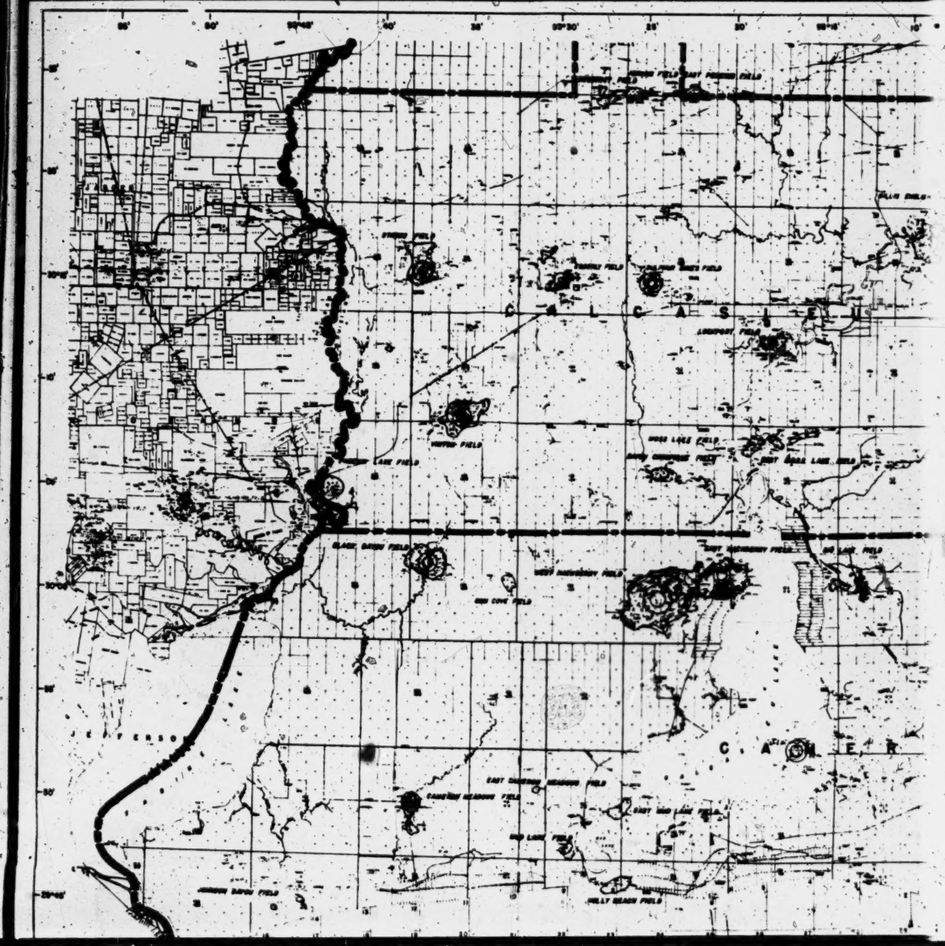
14	9	Change "long lines, pipeline" to "long line pipeline"
14	9	Change second comma to a period
14	10	Change "something" to "Something"
14	10	Change "wind" to "winds"
14	11-12	Change "consolidated" to "Consolidated"
15	2	Change "where, in" to "where. In"
15	8	Change "of" to "at"
86	9	Change "wuld" to "would"
89	19	Change "originall" to "originally"
142	24	Change "recess" to "request"
143	3	delete question mark
153	13	Change "Nowk" to "Now"
239	7	Change "underly" to "underlie"
[331] 239	8	Change "Transmission" to "Transmission's"
239	8	Change "gas, 1957" to "gas for 1957"
245	13	Change "4.73" to "12.71"
266	2	Change "tabs" to "tax"

Approved March 15, 1957

/s/ EWING G. SIMPSON
Presiding Examiner

• • •

Exhibit 1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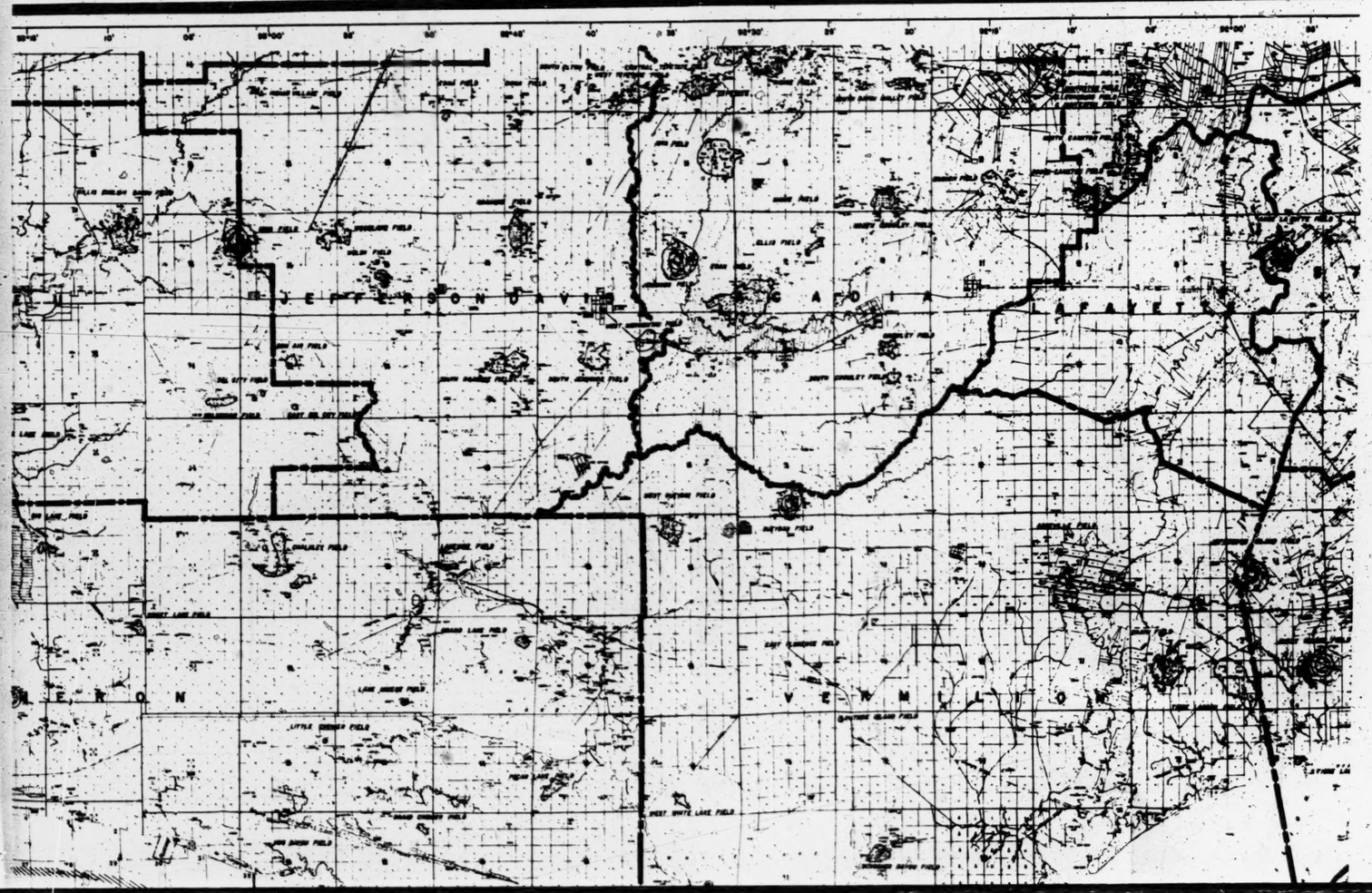
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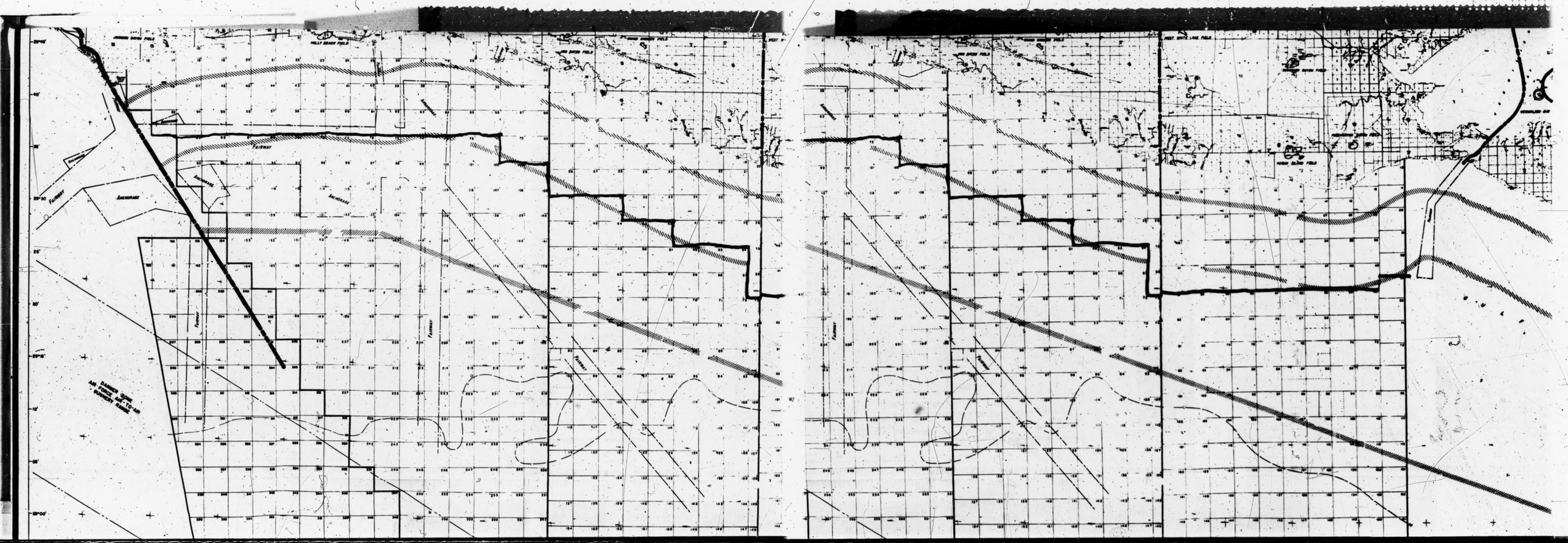
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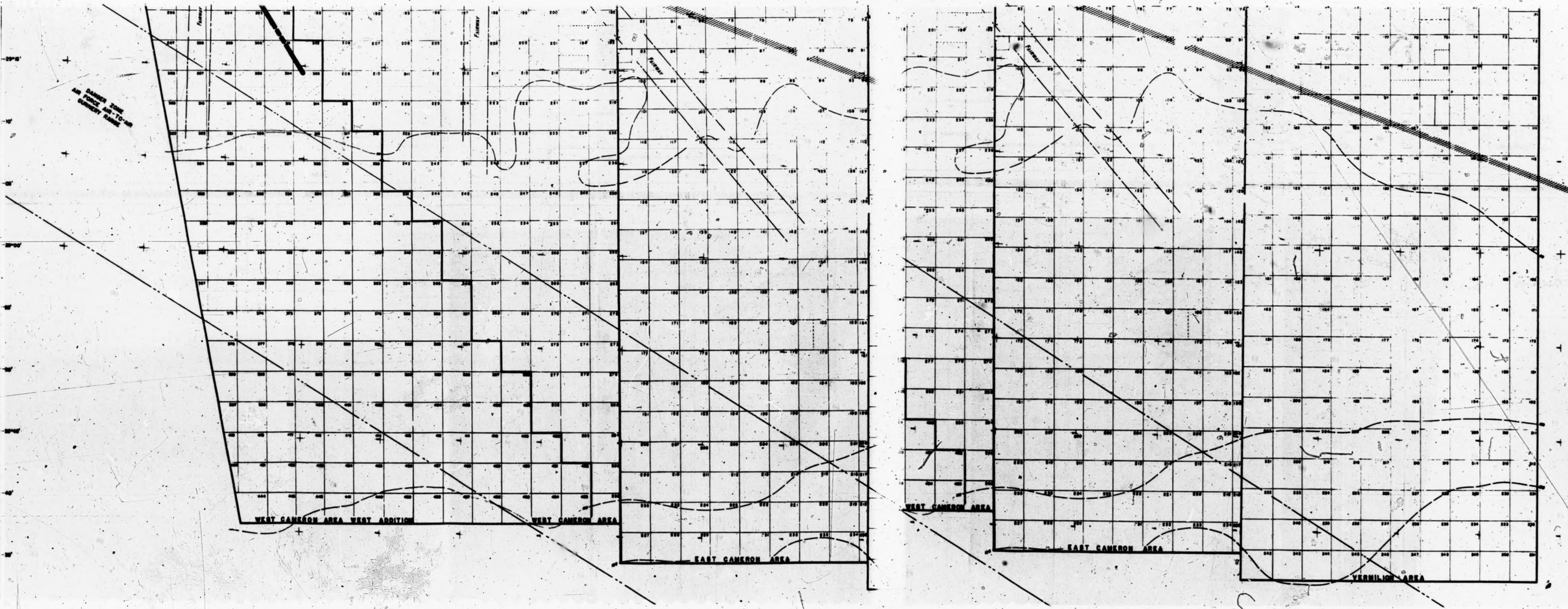
DANGER ZONE
AIR FORCE ARMY-NAVY
GUNNERY RANGE
Runway
Runway
Runway
WEST CAMERON AREA WEST ADDITION
WEST CAMERON AREA
EAST CAMERON AREA
WEST CAMERON AREA
EAST CAMERON AREA
VERMILION AREA

From Exhibit No. 2, Folder Entitled "In the Matter of Continental Oil Company, *et al.*, Docket Nos. G-11024, *et al.*, Gas Reserve Estimates":

TABLE, BLOCK 49 FIELD, EAST CAMERON AREA, CAMERON PARISH, LA., GAS RESERVE ESTIMATE

[334] ACREAGE DEDICATED TO THE TENNESSEE GAS TRANSMISSION COMPANY

NON-ASSOCIATED GAS

Line No.		Column 1	(2) Miocene	(3)
		L-1 (10,320')	M-1 (10,790')	Total
1.	Average depth	10,320	10,790	
2.	Depth to water contact (subsea)	10,344	10,800	
3.	Total dedicated acres	—	—	95,000.0
4.	Proven dedicated acres	640	640	
5.	Average pay thickness (feet)	10.0	10.0	
6.	Acre-feet (dedicated)	6,400	6,400	
7.	Porosity (%)	30	30	
8.	Connate water (%)	20	20	
9.	Reservoir temperature (°F)	222	228	
10.	Average initial reservoir pressure (PSIA)	4,813	7,128	
11.	Deviation factor for compressibility	.97	1.17	
12.	Gas in place MCF/ac. ft. at 14.65	2,702	3,290	
13.	Original gas in place MMCF at 14.65	17,293	21,056	38,349
14.	Recovery factor (%)	85	85	
15.	Original recoverable reserves MMCF at 14.65	14,699	17,898	32,597
16.	Cumulative production to 1/1/56 MMCF at 14.65	—	—	—
17.	Remaining recoverable reserves 1/1/56 MMCF at 14.65	14,699	17,898	32,597
18.	Number of wells	—	—	1
19.	Number of sand completions	—	—	1
20.	BTU content of gas	Above 1,000	Above 1,000	
21.	Gravity of gas	.76	.76	
22.	Remaining recoverable reserves 1/1/56 MMCF at 14.73	14,619	17,801	32,420

TABLE, BLOCK 62 FIELD, EAST CAMERON AREA, CAMERON PARISH, LA., GAS RESERVE ESTIMATE

[337] ACREAGE DEDICATED TO THE TENNESSEE GAS TRANSMISSION COMPANY

NON-ASSOCIATED GAS

Line No.	Column 1	(2)	(3)	(4)	(5)	(6)
			Miocene			
	D-3 (6,310')	D-4 (6,390')	F-1 (7,130')	F-2 (7,240')	F-3 (7,630')	Total
1. Average depth	6,310	6,390	7,130	7,240	7,630	
2. Depth to water contact (subsea)	6,340	6,410	7,185	7,280	7,700	
3. Total dedicated acres	—	—	—	—	—	95,000.0
4. Proven dedicated acres	1,226	671	1,360	610	1,334	
5. Average pay thickness (feet)	8.0	7.6	26.3	16.0	32.6	
6. Acre-feet (dedicated)	9,868	5,084	35,848	9,741	43,559	
7. Porosity (%)	30	30	30	30	30	
8. Connate water (%)	20	20	20	20	20	
9. Reservoir temperature (°F)	159	160	170	172	177	
10. Average initial reserve pressure (PSIA)	2,949	2,986	3,374	3,636	3,650	
11. Deviation factor for compressibility	.87	.87	.90	.91	.91	
12. Gas in place MCF/ac. ft. at 14.65	2,030	2,058	2,202	2,347	2,336	
13. Original gas in place MMCF at 14.65	20,032	10,462	78,937	22,862	101,754	234,047
14. Recovery factor (%)	85	85	85	85	85	
15. Original recoverable reserves MMCF at 14.65	17,027	8,893	67,097	19,433	86,491	198,941
16. Cumulative production to 1-1-56 MMCF at 14.65	—	—	—	—	—	—
17. Remaining recoverable reserves 1-1-56 MMCF at 14.65	17,027	8,893	67,097	19,433	86,491	198,941
18. Number of wells	—	—	—	—	—	2
19. Number of sand completions	—	—	1	1	2	4
20. BTU content of gas	Above 1,000	Above 1,000	Above 1,000	Above 1,000	Above 1,000	
21. Gravity of gas	.60	.60	.60	.60	.60	
22. Remaining recoverable reserves 1-1-56 MMCF at 14.73	16,935	8,845	66,733	19,327	86,021	197,861

283a

From Exhibit No. 2, Folder Entitled "In the Matter of Continental Oil Company, *et al.*, Docket Nos. G-11024, *et al.*, Gas Reserve Estimates":

TABLE, BLOCK 71 FIELD, EAST CAMERON AREA, CAMERON PARISH, LA., GAS RESERVE ESTIMATE

[343] ACREAGE DEDICATED TO THE TENNESSEE GAS TRANSMISSION COMPANY

NON-ASSOCIATED GAS

Line No.	Column 1	(2)	(3) Miocene	(4)	(5)
	G-1 (7,130')	H-1 (7,650')	I (8,090')	I-4 (8,440')	Total
1. Average depth	7,130	7,650	8,090	8,440	
2. Depth to water contact (subsea)	7,145	7,691	8,110	8,461	
3. Total dedicated acres	—	—	—	—	95,000.0
4. Proven dedicated acres	1,397	3,664	2,044	1,232	
5. Average pay thickness (feet)	10.0	20.2	14.4	4.4	
6. Acre-feet (dedicated)	13,970	74,013	29,434	5,421	
7. Porosity (%)	30	30	30	30	
8. Connate water (%)	20	20	20	20	
9. Reservoir temperature (°F)	174	181	187	192	
10. Average initial reservoir pressure (PSIA)	3,330	3,572	4,070	3,939	
11. Deviation factor for compressibility	.87	.89	.93	.92	
12. Gas in place MCF/ac. ft. at 14.65	2,237	2,324	2,512	2,439	
13. Original gas in place MMCF at 14.65	31,251	172,006	73,938	13,222	290,417
14. Recovery factor (%)	85	85	85	85	
15. Original recoverable reserves MMCF at 14.65	26,563	146,205	62,847	11,239	246,854
16. Cumulative production to 1-1-56 MMCF at 14.65	—	—	—	—	—
17. Remaining recoverable reserves 1-1-56 MMCF at 14.65	26,563	146,205	62,847	11,239	246,854
18. Number of wells	—	—	—	—	2
19. Number of sand completions	—.	1	1	—	2
20. BTU content of gas	Above 1,000	Above 1,000	Above 1,000	Above 1,000	
21. Gravity of gas	.65	.65	.65	.65	
22. Remaining recoverable reserves 1-1-56 MMCF at 14.73	26,419	145,411	62,506	11,178	245,514

2848

From Exhibit No. 2, Folder Entitled "In the Matter of Continental Oil Company, *et al.*, Docket Nos. G-11024, *et al.*, Gas Reserve Estimate":

TABLE, BLOCK 192 FIELD, WEST CAMERON AREA, CAMERON PARISH, LA., GAS RESERVE ESTIMATE

[348] ACREAGE DEDICATED TO THE TENNESSEE GAS TRANSMISSION COMPANY

NON-ASSOCIATED GAS

Line No.	Column 1	(2)	(3)	(4)	(5)	(6)	(7)	(8)	(9)	(10)	(11)	(12)	(13)	(14)	(1
								Miocene							
	B-15 (4,900')	C-1 (5,200')	D-2 (5,900')		D-4 (5,800')	E-1 (6,150')		E-2 (6,200')	F-2 (6,600')	G-2 (7,250')	I (8,100')	I-2 (8,250')		J-3 (8,800')	L-1 (
			Seg. I	Seg. II		Seg. I	Seg. II					Seg. I	Seg. II		
1. Average depth	4,900	5,200	5,900	5,900	5,800	6,150	6,150	6,200	6,600	7,250	8,100	8,250	8,250	8,850	
2. Depth to water contact (subsea)	4,942	5,196	5,716	5,683	5,892	6,177	6,129	6,238	6,652	7,270	8,112	8,339	8,280	8,899	
3. Total dedicated acres	—	—	—	—	—	—	—	—	—	—	—	—	—	—	
4. Proven dedicated acres	1,831	983	894	2,084	2,629	1,116	1,719	640	1,825	1,012	1,578	2,953	1,549	2,722	
5. Average pay thickness (feet)	18.3	7.1	4.1	17.1	46.0	6.1	14.8	20.0	27.4	10.8	23.4	27.9	30.7	29.9	
6. Acre-feet (dedicated)	33,507	6,979	3,665	35,636	120,934	6,808	25,441	12,800	50,005	10,930	36,925	82,389	47,554	81,388	4
7. Porosity (%)	30	30	30	30	30	30	30	30	30	30	30	30	30	30	
8. Connate water (%)	20	20	20	20	20	20	20	20	20	20	20	20	20	20	
9. Reservoir temperature (°F)	128	136	143	143	147	148	148	149	153	161	171	174	174	180	
10. Average initial reservoir pressure (PSIA)	2,376	2,421	2,625	2,625	2,681	2,887	2,887	2,910	3,084	3,396	4,770	4,360	4,360	4,866	
11. Deviation factor for compressibility	.83	.84	.85	.85	.84	.85	.85	.85	.85	.88	.96	.92	.92	.96	
12. Gas in place MCF/ac. ft. at 14.65	1,804	1,791	1,898	1,898	1,950	2,072	2,072	2,090	2,201	2,307	2,925	2,777	2,777	2,936	
13. Original gas in place MMCF at 14.65	60,447	12,499	6,956	67,637	235,821	14,106	52,714	26,752	110,061	25,216	108,006	228,794	132,057	238,955	12
14. Recovery factor (%)	80	80	80	80	80	80	80	85	85	85	85	85	85	85	
15. Original recoverable reserves MMCF at 14.65	48,358	9,999	5,565	54,110	188,657	11,285	42,171	22,739	93,552	21,434	91,805	194,475	112,248	203,112	10
16. Cumulative production to 1-1-56 MMCF at 14.65	—	—	—	—	—	—	—	—	—	—	—	—	—	—	
17. Remaining recoverable reserves 1-1-56 MMCF at 14.65	48,358	9,999	5,565	54,110	188,657	11,285	42,171	22,739	93,552	21,434	91,805	194,475	112,248	203,112	10
18. Number of wells	—	—	—	—	—	—	—	—	—	—	—	—	—	—	
19. Number of sand completions	1	—	1	—	1	—	—	—	—	—	1	2	—	1	
20. BTU content of gas	Above 1,000	Above 1,000	Above 1,000	Above 1,000	Above 1,000	Above 1,000	Above 1,000	Above 1,000	Above 1,000	Above 1,000	Above 1,000	Above 1,000	Above 1,000	Above 1,000	Above
21. Gravity of gas	.60	.60	.60	.60	.62	.62	.62	.62	.62	.63	.68	.70	.70	.70	
22. Remaining recoverable reserves 1-1-56 MMCF at 14.73	48,095	9,945	5,535	53,816	187,633	11,224	41,942	22,616	93,044	21,318	91,306	193,419	111,638	202,009	1

* * * *

Folder Entitled "In the Matter
l Company, *et al.*, Docket Nos.
as Reserve Estimate":

D, WEST CAMERON AREA, CAMERON
GAS RESERVE ESTIMATE

E TENNESSEE GAS TRANSMISSION COMPANY

ASSOCIATED GAS

Column 1	(2)	(3)	(4)	(5)	(6)	(7)	(8) Miocene	(9)	(10)	(11)	(12)	(13)	(14)	(15)	(16)
B-15 (4,900')	C-1 (5,200')	D-2 (5,900')		D-4 (5,800')	E-1 (6,150')		E-2 (6,200')	F-2 (6,600')	G-2 (7,250')	I (8,100')	I-2 (8,250')		J-3 (8,800')	L-1 (9,500')	Total
		Seg. I	Seg. II		Seg. I	Seg. II					Seg. I	Seg. II			
4,900	5,200	5,900	5,900	5,800	6,150	6,150	6,200	6,600	7,250	8,100	8,250	8,250	8,850	9,500	
4,942	5,196	5,716	5,683	5,892	6,177	6,129	6,238	6,652	7,270	8,112	8,339	8,280	8,899	9,554	
—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	95,000.0
1,831	983	894	2,084	2,629	1,116	1,719	640	1,825	1,012	1,578	2,953	1,549	2,722	1,357	
18.3	7.1	4.1	17.1	46.0	6.1	14.8	20.0	27.4	10.8	23.4	27.9	30.7	29.9	30.1	
33,507	6,979	3,665	35,636	120,934	6,808	25,441	12,800	50,005	10,930	36,925	82,389	47,554	81,388	40,846	
30	30	30	30	30	30	30	30	30	30	30	30	30	30	30	
20	20	20	20	20	20	20	20	20	20	20	20	20	20	20	
30	30	30	30	30	30	30	30	30	30	30	30	30	30	30	
20	20	20	20	20	20	20	20	20	20	20	20	20	20	20	
128	136	143	143	147	148	148	149	153	161	171	174	174	180	188	
2,376	2,421	2,625	2,625	2,681	2,887	2,887	2,910	3,084	3,396	4,770	4,360	4,360	4,866	5,190	
.83	.84	.85	.85	.84	.85	.85	.85	.85	.88	.96	.92	.92	.96	.98	
1,804	1,791	1,898	1,898	1,950	2,072	2,072	2,090	2,201	2,307	2,925	2,777	2,777	2,936	3,029	
60,447	12,499	6,956	67,637	235,821	14,106	52,714	26,752	110,061	25,216	108,006	228,794	132,057	238,955	123,723	1,443,744
80	80	80	80	80	80	80	85	85	85	85	85	85	85	85	
48,358	9,999	5,565	54,110	188,657	11,285	42,171	22,739	93,552	21,434	91,805	194,475	112,248	203,112	105,165	1,204,675
—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	
48,358	9,999	5,565	54,110	188,657	11,285	42,171	22,739	93,552	21,434	91,805	194,475	112,248	203,112	105,165	1,204,675
—	—	—	—	—	—	—	—	—	—	—	—	—	—	—	6
1	—	1	—	1	—	—	—	—	—	1	2	—	1	1	8
Above 1,000	Above 1,000	Above 1,000	Above 1,000	Above 1,000	Above 1,000	Above 1,000	Above 1,000	Above 1,000	Above 1,000	Above 1,000	Above 1,000	Above 1,000	Above 1,000	Above 1,000	—
.60	.60	.60	.60	.62	.62	.62	.62	.62	.63	.68	.70	.70	.70	.72	—
48,095	9,945	5,535	53,816	187,633	11,224	41,942	22,616	93,044	21,318	91,306	193,419	111,638	202,009	104,594	1,198,134

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Item No. A, Gas Purchase and Sales Agreement, Dated August 17, 1956, Between Tennessee Gas Transmission Company, as Buyer and Continental Oil Company, as Seller

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[489] GAS PURCHASE AND SALES AGREEMENT
EAST CAMERON, WEST CAMERON
AND VERMILION AREAS

AGREEMENT made and entered into this 17th day of August, 1956, by and between Tennessee Gas Transmission Company, a Delaware corporation, herein called "Buyer", and Continental Oil Company, a Delaware corporation, hereinafter referred to as "Seller".

WITNESSETH THAT:

Buyer and Seller, in consideration of the payment of One Dollar ($1.00), the receipt of which is hereby acknowledged, and the mutual agreements herein contained, hereby covenant and agree as follows:

1. *Definitions*—For the purposes of this contract the following definitions shall be applicable:

(a) The term "gas" shall include casinghead gas produced with crude oil, natural gas from gas wells, and residue gas resulting from processing either casinghead gas or gas well gas or both.

(b) The term "leases" shall mean the oil, gas and mineral leases described in Exhibit "A" attached hereto, and the lands covered thereby, in which Seller holds gas rights which are dedicated to this contract as provided in Section 4 hereof.

Item No. A, Gas Purchase and Sales Agreement, Dated August 17, 1956, Between Tennessee Gas Transmission Company, as Buyer and Continental Oil Company, as Seller

(c) The term "dedicated reserves" shall mean the gas reserves as limited by reservoirs or depths and maximum quantities herein, located in and under the leases, which are attributable to the interest of Seller therein.

(d) The phrase "recoverable gas originally in place" shall mean the gas in the dedicated reserves as of the date of initial delivery of gas hereunder which is recoverable from wells drilled on the leases, based upon knowledge concerning all dedicated reservoirs penetrated by such wells and conditions existing at the time of the particular determination or redetermination.

(e) A day shall begin at 8 o'clock A.M. on each calendar day and end at 8 o'clock A.M. on the following calendar day, and a month or year shall begin at 8 o'clock A.M. on the first calendar day of such period of time and end at 8 o'clock A.M. on the first calendar day following such period.

(f) The term "MCF" shall mean one thousand (1,000) cubic feet.

(g) The term "contract quantity" shall mean the quantity per day specified in Subsection (a) of Section 3, or Subsection (b) of Section 3 hereof.

2. *Certificates of Public Convenience and Necessity and Construction of Facilities:*

(a) Each of the parties hereto will file with the Federal Power Commission and other regulatory bodies having jurisdiction, necessary application, if any, for [490] cer-

Item No. A, Gas Purchase and Sales Agreement, Dated August 17, 1956, Between Tennessee Gas Transmission Company, as Buyer and Continental Oil Company, as Seller

tificates of public convenience and necessity satisfactory to the applicant without delay following the execution hereof. Such application, if any, will be prosecuted diligently to the end that, if issued, such certificates will be issued on or before April 1, 1957. In the event any of such applications are denied, or if satisfactory certificates have not been issued by April 1, 1957, either party hereto may, by written notice mailed to the other party hereto, terminate this contract in its entirety, and if either such party so terminates this contract, then the respective obligations of the parties to sell and buy gas hereunder shall be of no force and effect from the date of such termination.

(b) If such certificates are issued and neither party hereto has cancelled this contract as provided in Subsection (a) of this Section 2, Buyer will install, or cause to be installed and placed in operation, by November 1, 1957, the facilities necessary to receive deliveries of gas hereunder, and Seller will use due diligence to install and place in operation, or cause to be installed and placed in operation, the necessary facilities to be installed for delivery of gas hereunder at the delivery point or points hereinafter provided.

3. *Quantity:*

(a) Subject to the provisions of this contract, Seller agrees to sell and deliver to Buyer, and Buyer agrees to purchase and receive (or if available and not taken, Buyer agrees to pay for) the following quantities of gas

Item No. A, Gas Purchase and Sales Agreement, Dated August 17, 1956, Between Tennessee Gas Transmission Company, as Buyer and Continental Oil Company, as Seller

per day from the dedicated reserves, subject to reductions as provided in Subsections (b), (f) or (g) of this Section 3:

(i) From November 1, 1957, until November 1, 1958, a quantity equal to twenty-five per cent (25%) of the smaller of the two following quantities:

(1) One hundred seventy-five thousand (175,000) MCF per day, or;

(2) Four-fifths (4/5) of the total quantity which the wells are capable of producing when produced at their respective maximum efficient rates of flow; and

(ii) From November 1, 1958 and during the remainder of the term hereof, as such term may be extended hereby, a quantity equal to one thousand (1,000) MCF for each eight million (8,000,000) MCF of recoverable gas originally in place in the dedicated reserves.

(b) In the event Buyer is obligated to take natural gas from gas wells or residue gas resulting from processing gas well gas under the provisions of paragraph (ii) of Subsection (a) of this Section 3, or if the quantity of such gas may have been reduced by Seller under Subsection (f) of this Section 3, Buyer shall, during the calendar months of July, August and September of any year during the term hereof, have the right to reduce the quantity of such gas well gas or residue gas which Buyer is so obligated to take during such calendar months by as much as twenty-five per cent (25%).

Item No. A, Gas Purchase and Sales Agreement, Dated August 17, 1956, Between Tennessee Gas Transmission Company, as Buyer and Continental Oil Company, as Seller

(c) In the event Buyer exercises its right to reduce the volume of gas Buyer is obligated to purchase or pay for hereunder as provided in Subsection (b) of this Section 3, Buyer shall, during the nine (9) calendar months following the last month [491] during which such reduction is in effect, purchase or pay for, if available, at the then effective price, in addition to the volume of gas Buyer is obligated to take hereunder, the aggregate volume which Buyer was relieved of taking or would not take by reason of Buyer's exercising the right so to reduce the quantity of such gas during such three (3) calendar months.

(d) Subject to the provisions of Section 6 hereof, Buyer shall have the right to purchase, and Seller will install, maintain and operate the necessary delivery facilities and will deliver to Buyer such quantity of gas per day, in addition to the contract quantity, as Buyer may from day to day elect to purchase up to a total quantity (including the contract quantity) equal to the smallest of the following quantities:

(1) The total quantity which the wells are capable of producing when produced at their respective maximum efficient rates of flow; or

(2) The total quantity which the wells are capable of producing when produced at their respective allowable rates of flow under applicable orders, rules, regulations or laws; or

(3) The total quantity equal to one hundred twenty-five per cent (125%) of the contract quantity hereunder.

Item No. A, Gas Purchase and Sales Agreement, Dated August 17, 1956, Between Tennessee Gas Transmission Company, as Buyer and Continental Oil Company, as Seller

(e) The gas purchased hereunder shall be delivered and received as nearly as practicable at uniform hourly and daily rates of flow. However, if at any time during the term hereof the daily quantity to be delivered hereunder contains gas well gas or residue gas resulting from processing gas well gas, the daily quantity of gas actually delivered and taken may vary ten per cent (10%) above or below the quantity to be delivered hereunder, but in no event, however, shall the total quantity delivered and taken during the month vary more than five per cent (5%) above or below the total quantity which was to have been delivered hereunder for such month. Any deficit occurring by reason of such permitted variation shall, subject to each party's ability so to do, be adjusted in gas as soon as reasonably possible but not after twelve (12) months from the accrual of such deficit.

(f) If, after the date of initial delivery of gas hereunder, for any period of six (6) consecutive months for any reason other than force majeure, Buyer does not purchase hereunder, or pay for, within the time provided in this contract, if available, at least the total contract quantity (within the permitted variation provided by Subsection (e) of this Section 3) for such period, Seller may upon written notice to Buyer within the next following thirty (30) days, in addition to any other rights which Seller may have, reduce the contract quantity to the average daily quantity which Buyer purchased hereunder during such six (6) months period. If Seller does reduce the contract quantity, Seller may by like concurrent notice also reduce in the same proportion the additional quantity deliverable under

Item No. A, Gas Purchase and Sales Agreement, Dated August 17, 1956, Between Tennessee Gas Transmission Company, as Buyer and Continental Oil Company, as Seller

the foregoing Subsection (d) and the dedicated reserves; and, if requested by Seller, Buyer will deliver written acknowledgment to Seller that the gas reserves then dedicated hereto are released from such dedication to the extent of the same percentage thereof that the contract quantity is so reduced.

(g) If, after the date of initial delivery of gas hereunder, Seller fails, for any reason other than force majeure, to make available for delivery to Buyer hereunder for any period of six (6) consecutive months the total contract quantity (within the variation permitted by Subsection (e) of this Section 3) for such period, Buyer may, in [492] addition to any other rights which Buyer may have, reduce the contract quantity to the average daily quantity which Seller did make available during such six (6) months period.

(h) If the quantities of gas taken by Buyer hereunder during any semi-annual period after the date of initial delivery of gas hereunder have not permitted Seller to maintain ratable withdrawals from any reservoir subject hereto, (under existing applicable rules, regulations, orders or laws) with other operators withdrawing gas from the same reservoir and if Seller during such period or during the ensuing semi-annual period has been unable to adjust deliveries as between the reservoirs subject hereto within the total quantities of gas sold hereunder so as to maintain ratable withdrawals from any such reservoir and at the same time comply with the lease or leases underlain by such reservoir, Buyer will purchase and receive or will

Item No. A, Gas Purchase and Sales Agreement, Dated August 17, 1956, Between Tennessee Gas Transmission Company, as Buyer and Continental Oil Company, as Seller

pay for if available and not taken, during any semi-annual period following a period of twelve (12) months from and after the initial date of the first semi-annual period mentioned above that additional quantity of gas over and above the contract quantity for such period which will permit Seller to make up the deficiency in ratable withdrawals accruing during the first semi-annual period mentioned above.

(i) Seller may allocate the total quantities of gas to be purchased and received by Buyer hereunder between the several fields covered by this contract in such quantities as it so desires; provided, however, Seller will not allocate a quantity of gas to be received by Buyer from any field covered hereby, in excess of a quantity equal to one thousand one hundred sixty (1,160) MCF for each eight million (8,000,000) MCF of recoverable gas originally in place in the reservoir or reservoirs in any field from which such gas is produced, if allocation of a greater quantity thereto would cause Buyer to suffer undue hardship by reason of its obligations to protect other producers producing from the same reservoir from drainage or by reason of lack of capacity in Buyer's facilities serving such reservoir. Seller may also deliver gas to Buyer from acreage or gas reservoirs not dedicated to the performance of this contract so long as deliveries of such gas by Seller to Buyer do not affect the daily quantity of gas to be delivered to Buyer hereunder and Buyer is not required to install any facilities to accomplish receipt of deliveries of gas from such reservoirs, but such deliveries shall be applied to the quantity of gas Seller is obligated to deliver hereunder.

Item No. A, Gas Purchase and Sales Agreement, Dated August 17, 1956, Between Tennessee Gas Transmission Company, as Buyer and Continental Oil Company, as Seller

(j) Seller may deliver to Buyer from the gas reserves dedicated hereto quantities of gas in addition to quantities provided elsewhere herein, up to a maximum of twenty-five per cent (25%) of fifty thousand (50,000) MCF per day which quantities shall be delivered to Buyer under the terms of this contract, but shall be allocable to quantities which Seller is then prevented from delivering to Buyer from other gas reserves dedicated to Buyer by Seller located in fields in the West Delta Area, provided, however,

(1) The deliveries to Buyer by Seller of such additional quantities of gas shall not interfere with taking of gas by Buyer for the purpose of making up deficiencies in take accrued under the terms of this contract; and

(2) The deliveries to Buyer by Seller of such additional quantities of gas shall not cause Buyer to increase its takes from any other producer to protect such other producer from drainage; and

[493] (3) The deliveries to Buyer by Seller of such additional quantities of gas shall not cause Buyer to construct any additional facilities in order to handle such additional gas in Buyer's system.

4. *Dedication of Reserves:*

(a) Subject to the terms and provisions of this contract, Seller dedicates to the performance of this contract all gas produced from and attributable to the interest of Seller in the reservoirs listed in Exhibit "A" or down to the respective depth limitations set out therein in and under the corresponding leases and lands listed in such

Item No. A, Gas Purchase and Sales Agreement, Dated August 17, 1956, Between Tennessee Gas Transmission Company, as Buyer and Continental Oil Company, as Seller

Exhibit "A" hereto annexed and made a part hereof and Seller's leasehold or other estate in and under all such lands and leases as so limited to reservoirs or depth mentioned above up to a quantity equal to twenty-five per cent (25%) of two trillion (2,000,000,000,000) cubic feet.

(b) On or before August 1, 1957, Seller may dedicate gas reserves located in the East Cameron, West Cameron and Vermilion Areas, to the performance of this contract, in addition to the gas reserves contemplated by Subsection (a) of this Section 4, up to a quantity equal to twenty-five per cent (25%) of one trillion (1,000,000,000,000) cubic feet. In the event Seller so dedicates such additional gas reserves hereto, Buyer will be obligated hereunder to purchase or pay for gas produced therefrom, if available, commencing November 1, 1958; provided, however, in the event Buyer or Seller has not obtained all requisite certificates and authorities, if any, necessary to purchase and deliver such gas respectively, satisfactory to the party receiving the same by April 1, 1958, either Buyer or Seller may cancel such dedication of such additional gas reserves hereto by written notice to the other party delivered after April 1, 1958. If either party so cancels such dedication of gas reserves hereto, both parties hereto from the date of such cancellation shall be absolved and relieved of all obligations hereunder respecting such additional gas reserves.

(c) In the event Seller does not dedicate additional gas reserves to the performance of this contract in accordance

Item No. A, Gas Purchase and Sales Agreement, Dated August 17, 1956, Between Tennessee Gas Transmission Company, as Buyer and Continental Oil Company, as Seller

with the provisions of Subsection (b) of this Section 4, or if Seller does so dedicate such additional gas reserves hereto and such dedication is cancelled in accordance with the provisions of Subsection (b) of Section 4, Seller may, on or before August 1, 1958, dedicate gas reserves located in the East Cameron, West Cameron and Vermilion Areas, to the performance of this contract, in addition to the gas reserves contemplated by Subsection (a) of this Section 4, up to a quantity equal to twenty-five per cent (25%) of one trillion (1,000,000,000,000) cubic feet. In the event Seller so dedicates such additional gas reserves hereto, Buyer will be obligated hereunder to purchase or pay for gas produced therefrom, if available, commencing November 1, 1959; provided, however, in the event Buyer or Seller has not obtained all requisite certificates and authorities, if any, necessary to purchase and deliver such gas respectively, satisfactory to the party receiving the same by April 1, 1959, either Buyer or Seller may cancel such dedications of such additional gas reserves hereto by written notice to the other party delivered after April 1, 1959. If either party so cancels such dedication of gas reserves hereto, both parties hereto from the date of such cancellation shall be absolved and relieved of all obligations hereunder respecting such additional gas reserves.

(d) Seller may also dedicate gas reserves located in the East Cameron, West Cameron and Vermilion Areas, to the performance of this contract, in addition to those gas reserves contemplated by Subsection (a) of this Section 4 and those gas reserves [494] which Seller may dedicate by Subsection (b) or (c) of this Section 4. Seller may

Item No. A, Gas Purchase and Sales Agreement, Dated August 17, 1956, Between Tennessee Gas Transmission Company, as Buyer and Continental Oil Company, as Seller

so dedicate such additional gas reserves not more than once during each twelve (12) month period commencing August 1, 1958 and ending August 1, 1967, upon the following conditions:

(1) Each such additional dedication shall be limited to an amount equal to twenty-five per cent (25%) of four hundred billion (400,000,000,000) cubic feet.

(2) Seller shall notify Buyer prior to each August 1st. commencing August 1, 1958 and ending August 1, 1967, of the gas reserves Seller desires to so dedicate hereto, if any. Buyer will not be obligated to connect such additional gas reserves so dedicated hereto to Buyer's system prior to fifteen (15) months from and after the date August 1st, first following receipt by Buyer of such notice from Seller.

(3) To connect such additional gas reserves hereunder to Buyer's system, Buyer will not be obligated to construct and place in operation in excess of one mile of lateral gathering line for each ten billion (10,000,000,000) cubic feet of such additional gas reserves so dedicated hereto.

(4) The term of this agreement shall be so extended insofar as such additional gas reserves are concerned, to cover a period of time terminating twenty (20) years from and after the date of initial delivery of gas to Buyer from such additional gas reserves so dedicated hereto.

5. *Determination of Reserves:*

(a) On or before the date of initial delivery of gas hereunder, Buyer and Seller will endeavor to determine

Item No. A, Gas Purchase and Sales Agreement, Dated August 17, 1956, Between Tennessee Gas Transmission Company, as Buyer and Continental Oil Company, as Seller

by agreement the total quantity of recoverable gas in place dedicated hereto as of the date of initial delivery hereunder. From time to time after the first such determination, but not more often than once in any twelve (12) month period, upon written request of either Buyer or Seller to the other, Buyer and Seller will endeavor promptly to redetermine by agreement the total quantity of recoverable gas originally in place in reservoirs then dedicated.

(b) If the first determination of quantity of recoverable gas originally in place or any subsequent determination or redetermination is not made within sixty (60) days after written request therefor, then the first determination or such subsequent determination or redetermination shall be made by arbitration upon written demand by Buyer or Seller.

(c) The latest determination or redetermination of the total quantity of recoverable gas originally in place, fixed at the nearest one thousand (1,000) MCF, shall be controlling for all purposes of Subsection (a) or (b) of Section 3 hereof until the next redetermination is made.

6. *Reservations of Seller*—Seller reserves the following rights:

(a) To operate its property free from any control by Buyer in such a manner as Seller, in its sole discretion, may deem advisable, including without limitation, the right to determine when, where or whether to drill new wells, to repair and rework old wells, and to abandon any

Item No. A, Gas Purchase and Sales Agreement, Dated August 17, 1956, Between Tennessee Gas Transmission Company, as Buyer and Continental Oil Company, as Seller

well or surrender any lease when no longer deemed by Seller to be capable of producing gas in paying quantities under normal methods of [495] operation; provided, however, in the event Seller should terminate or surrender any lease described in Exhibit "A" hereto, written notice of same shall be given to Buyer within thirty (30) days;

(b) In addition to mechanical or low temperature separation, to process the gas, or have same processed for the recovery of liquefiable hydrocarbons including the methane-ethane stream; provided, however, that such processing will not, including shrinkage and fuel, remove more than ten per cent (10%) of the volume of gas produced and delivered by Seller to Buyer daily hereunder; and provided further, that such processing will not render the gas incapable of meeting the quality specifications contained herein. Seller may so process the gas or have same so processed before delivery to Buyer, or after delivery to Buyer at a mutually agreeable point in Cameron or Vermilion Parishes or South of U. S. Highway No. 90 in Jefferson Davis or Calcasieu Parishes, Louisiana, on Buyer's lateral line serving the dedicated reserves, but before the gas is commingled with other gas delivered to Buyer by other producers producing such other gas from leases not dedicated hereto. Seller may also process the gas or cause same to be processed on Buyer's line at such mutually agreeable point after commingling with other gas provided arrangements can be mutually agreed upon as between the parties hereto and any other producers who deliver gas to Buyer upstream from the facilities used for such processing;

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(c) In the event Seller elects to separate by mechanica or low temperature means or to process the gas afte delivery to Buyer as provided in Subsection (b) of th Section 6, even though the gas has been separated on o processed before delivery to Buyer, Seller will deliver th gas hereunder to Buyer at the offshore delivery point provided herein and Buyer shall accept, along with the ga so delivered at such points, delivery of the liquefiab hydrocarbons produced with such gas which Seller wi remove, or cause to be removed, from such gas at the loca tion provided in Subsection (b) of this Section 6, and tit to such liquefiable hydrocarbons to be so removed from th gas by Seller shall be retained by Seller. No charge sha be made by Buyer for transporting such liquefiable hydr carbons combined with the gas delivered to Buyer at th offshore delivery points by Seller, from such deliver points to the separation or processing facilities to be con structed, or caused to be constructed, by Seller, except tha Buyer shall be reimbursed in full by Seller for any taxe or other assessment or charge, present or future, levie and assessed against and paid by Buyer for such liquefiab hydrocarbons by reason of the service performed by Buye in receiving, transporting or delivering such liquefiab hydrocarbons to said facilities, or otherwise in respect o such liquefiable hydrocarbons which in any way increase the obligations or amounts payable by Buyer under Sectio 10 hereof.

Buyer will indemnify and save Seller harmless from a loss, damage and expense which may be asserted by reas of accidents or occurrences resulting from Buyer's opera

Item No. A, Gas Purchase and Sales Agreement, Dated August 17, 1956, Between Tennessee Gas Transmission Company, as Buyer and Continental Oil Company, as Seller

tions in transporting liquefiable hydrocarbons from such delivery points to such separation or processing facilities, but Buyer shall not be responsible to Seller for loss of liquefiable hydrocarbons in transit except losses which may result from negligence on the part of Buyer in maintaining and operating Buyer's gathering and lateral line or lines serving the gas to be delivered hereunder.

Seller agrees to indemnify and save Buyer harmless from all loss, damage and expense which may be asserted by reason of accidents or occurrences resulting from Seller's operation in processing the gas delivered through said separation or processing facilities.

[496] (d) To use gas produced from the leases for developing and operating Seller's leases listed in Exhibit "A" and Seller's other leases in the immediate vicinity, for the operation of Seller's pipe lines, water stations, camps, platform installations and other miscellaneous uses incident to the operation of such leases, and to fulfill obligations to the Lessor therein;

(e) To unitize any of its leases with other properties of Seller and of others in the same field, in which event this contract will cover Seller's interest in the unit which is attributable to the gas reserves dedicated hereto;

(f) To use gas produced from the leases in any particular field covered hereby for repressuring, pressure maintenance or cycling operations for the leases listed in Exhibit "A"; provided, however, if as a result of such use, Seller is thereby rendered unable to deliver to Buyer the then applicable daily contract quantity hereunder, the

term of the contract shall be extended beyond its primary term, until Buyer has thereafter had the opportunity to purchase from Seller at the then applicable contract rate and price, and in accordance with the other terms hereof, a quantity of gas equal to the accumulated deficiencies not delivered by Seller which has occurred by reason of Seller's election under this Subsection (f).

7. *Quality of Gas*—Seller agrees that the gas delivered hereunder will be merchantable gas and will upon delivery

(a) Have a total heating value of not less than one thousand (1,000) British thermal units per cubic foot; however, should the total heating value of the gas fall below one thousand (1,000) British thermal units per cubic foot during any month, Buyer at Buyer's sole discretion may refuse to accept delivery thereof, or may accept delivery thereof and reduce the total amount payable as the purchase price for gas delivered under this agreement for each month during which such condition obtains by an amount determined by multiplying such total amount by a fraction having as its numerator the deficiency of British thermal units below one thousand (1,000) and as its denominator one thousand (1,000);

(b) Except as provided in Subsection (c) of Section 6, be commercially free from dust, water and any other substance that might become separated from the gas in Buyer's pipe lines; and Seller will furnish, install, maintain and operate such drips, separators, heaters and other mechanical devices as may be necessary to effect compliance with such requirements;

Item No. A, Gas Purchase and Sales Agreement, Dated August 17, 1948, Between Tennessee Gas Transmission Company, as Buyer and Continental Oil Company, as Seller

(c) Not contain more than twenty (20) grains of total sulphur, nor more than one (1) grain of hydrogen sulphide, per one hundred (100) cubic feet;

(d) Have a temperature of not more than one hundred forty degrees (140°) Fahrenheit; and

(e) Have been dehydrated by Seller for removal of entrained water present therein in a vapor state, and in no event contain more than seven (7) pounds of entrained water per million cubic feet, at a pressure base of fourteen and seven-tenths (14.7) pounds per square inch and a temperature of sixty degrees (60°) Fahrenheit as determined by dew-point apparatus approved by the Bureau of Mines.

(f) As to gas which cannot meet the specifications set out in (c) and (d) above, Buyer shall have the option to:

[497] (1) Refuse to accept delivery of such gas, in the event Seller cannot correct such deficiency within a reasonable time, in which event the contract will terminate as to such gas; or,

(2) Accept such gas at a reduced price, which price reduction is to be mutually agreed upon by the parties hereto.

8. *Delivery Pressure and Point of Delivery*:

(a) Seller shall make deliveries of gas hereunder to Buyer at a pressure sufficient to enter Buyer's facilities, but in no event shall such required pressure exceed one thousand (1,000) pounds per square inch gauge.

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(b) The points of delivery for all gas delivered to Buyer hereunder shall be at a valve on the discharge side of Seller's meter, to be located on each of the platforms erected and designated by Seller on a lease or leases listed in Exhibit "A" hereto as such Exhibit may be amended from time to time, and at such other points as may be mutually agreeable to the parties hereto.

(c) Seller shall not be obligated to install or operate compression facilities in order to deliver gas to Buyer hereunder, but Seller may do so at Seller's option. Buyer shall not be obligated to install or operate compression facilities in order to receive gas hereunder, but may do so at Buyer's option; provided, however, if during the term hereof, the flowing pressures of the gas wells then delivering gas to Buyer hereunder from any of the Areas A, B, C or D, as such Areas are described below, decline to such an extent that the contract quantity applicable to the dedicated reserves in the Area affected by such decline cannot be produced and delivered to Buyer against the operating pressure in Buyer's system serving such Area so affected, Buyer will reduce Buyer's operating pressure sufficiently to allow Seller to make available to Buyer from the Area so affected the contract quantity applicable to the dedicated reserves in the Area so affected, but in no event shall Buyer be obligated to reduce any operating pressure at any delivery point provided herein to a pressure below seven hundred (700) pounds per square inch gauge.

As used in this Subsection (c) of this Section 8, the terms Area A, Area B, Area C and Area D shall have the following meanings:

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Area A shall mean the acreage contained in Blocks 193, the South ½ of 192, the South ½ of 191, and the North ½ of 194, all situated in the West Cameron Area and the Northwest ¼ of Block 83, situated in the East Cameron Area.

Area B shall mean the acreage contained in Blocks 49, 50, 51, 62, 63 and 67, all situated in the East Cameron Area.

Area C shall mean the acreage contained in Blocks 58, 59, 70, 71 and 72, all situated in the East Cameron Area.

Area D shall mean the acreage contained in Blocks 86, 96, 108, the West ½ of 95, the South ½ of 87, the North ½ of 78 and the North ½ and Southwest ¼ of 75, all situated in the Vermilion Area.

[498] 9. *Measurement and Tests*—The measurement and tests for quality of gas delivered hereunder shall be governed by the following:

(a) The volumes shall be measured by orifice meters installed and operated, and computations made, as prescribed in Gas Measurement Committee Report No. 3 dated April, 1955, of the American Gas Association, as such report may be amended or revised from time to time.

(b) The unit of volume for purposes of measurement shall be one (1) cubic foot of gas at a temperature base of sixty degrees (60°) Fahrenheit and at a pressure base

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of fifteen and twenty-five thousandths (15.025) pounds per square inch absolute.

(c) The arithmetical average of the hourly temperature recorded during each day, the factor for specific gravity according to the latest test therefor, and the corrections for deviation from Boyle's Law applicable during each day shall be used to make proper computations of volumes hereunder. Chart integration and volume computations shall be made by Seller as accurately as possible and within the accuracy prescribed by the manufacturer of the computing equipment used.

(d) Temperature shall be determined by a recording thermometer continuously used and installed so as to record properly the temperature of the gas flowing through the meter.

(e) Specific gravity shall be determined with accuracy to nearest one thousandth by taking samples of the gas at the delivery point or points at such times as may be designated by Buyer, but not more often than once each month, and having the specific gravity determined by the use of the Acme gravity balance, or any other instrument mutually agreeable and acceptable to the industry.

(f) Deviation from Boyle's Law at the pressures, specific gravity and temperatures upon delivery shall be determined by joint test at intervals of three (3) months or as often as found necessary. The apparatus and method recommended by the National Bureau of Standards, or as otherwise mutually agreed upon, shall be used in making such tests. Each test shall determine the

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corrections to be used in computing volumes until the next test is made.

(g) The total heat value of the gas shall be determined by joint tests made by taking samples of the gas at the delivery point or points at such times as may be designated by Buyer, but not more often than once each month, and having the British thermal unit content per cubic foot determined by calorimeter test. The British thermal unit content per cubic foot shall be determined by an accepted type of recording calorimeter for a cubic foot of gas at a temperature of sixty degrees (60°) Fahrenheit when saturated with water vapor and at an absolute pressure equivalent to thirty inches (30″) of mercury at thirty-two degrees (32°) Fahrenheit.

(h) Tests to determine sulphur and hydrogen sulphide content shall be made by approved standard methods in general use by the gas industry, and the water vapor content shall be determined by use of dew-point apparatus approved by the Bureau of Mines.

(i) All measuring and testing equipment, housing, devices, and materials shall be of standard manufacture and type approved by Buyer, and shall, with all related [499] equipment, appliances and buildings be installed, maintained and operated, or furnished by Seller, at Seller's expense, and the size, type and specifications of the foregoing must be approved by Buyer before same is fabricated and installed at the delivery point. Buyer's approval shall not be unreasonably withheld. Buyer may install and operate check measuring and testing equip-

ment which shall not interfere with the use of Seller's equipment.

(j) The accuracy of Seller's measuring and testing equipment shall be verified at least once each month and at other times upon request of Buyer or Seller. Tests for quality of the gas may be made at the time of testing equipment or at other times, but not more often than once each month. Notice of the time and nature of each test shall be given by Seller to Buyer sufficiently in advance to permit convenient arrangement for Buyer's representative to be present. Measuring and testing equipment shall be tested by means and methods approved by Buyer (which approval shall not be unreasonably withheld). Tests and adjustments shall be made in the presence of and observed by representatives of both Buyer and Seller, if present. If, after proper notice, Buyer fails to have a representative present, the results of the tests shall nevertheless be considered accurate until the next tests are made. All tests shall be made at Seller's expense, except that Buyer shall bear the expense of tests made at its request if the inaccuracy found is two per cent (2%) or less.

(k) If at any time any of the measuring or testing equipment is found to be out of service, or registering inaccurately in any percentage, it shall be adjusted at once to read accurately, within the limits prescribed by the manufacturer. If such equipment is out of service, or inaccurate by an amount exceeding two per cent (2%) at a reading corresponding to the average rate of flow

for the period since the last preceding test, the previous readings of such equipment shall be disregarded for any period definitely known or agreed upon, or if not so known or agreed upon, for a period of sixteen (16) days or one-half of the elapsed time since the last test, whichever is shorter. The volume of gas delivered during such period shall be estimated by (a) using the data recorded by any check measuring equipment if installed and accurately registering, or if not installed or registering accurately, (b) by correcting the error if the percentage of error is ascertainable by calibration, test or mathematical calculation, or, if neither such method is feasible, (c) by estimating the quantity, or quality, delivered, based upon deliveries under similar conditions during a period when the equipment was registering accurately. No correction shall be made for recorded inaccuracies of two per cent (2%) or less.

(l) Buyer and Seller shall have the right to inspect equipment installed or furnished by the other, and the charts and other measurement or testing data of the other, at all times during business hours; but the reading, calibration and adjustment of such equipment and changing of charts shall be done only by the party installing and furnishing the same. Each party shall preserve all original test data, charts and other similar records, in such party's possession, for a period of at least three (3) years.

(m) Seller shall at its expense, furnish Buyer necessary data daily as required for calculating average hourly

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volumes delivered during the preceding twenty-four (24) hour period.

10. *Prices*—The prices to be paid by Buyer to Seller for all gas delivered to or, if available and not taken by Buyer, to be paid for hereunder, shall be as follows:

[500]

From the date of initial delivery or November 1, 1957, whichever occurs first, until November 1, 1962	21.4 Cents per MCF
From November 1, 1962 to November 1, 1966	23.4 Cents per MCF
From November 1, 1966 to November 1, 1970	25.4 Cents per MCF
From November 1, 1970 to November 1, 1974	27.4 Cents per MCF
From November 1, 1974 to November 1, 1978 or to the date of expiration of this contract, whichever is earlier	29.4 Cents per MCF

In the event the term of this contract is continued or extended hereunder beyond November 1, 1978:

From November 1, 1978 to November 1, 1982	31.4 Cents per MCF
From November 1, 1982 to November 1, 1986	33.4 Cents per MCF
From November 1, 1986 to expiration of this contract	35.4 Cents per MCF

Seller shall pay all Federal and State of Louisiana production, severance, or similar taxes now being levied

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in respect of or applicable to the gas delivered hereunder; provided, however, that if any such taxes in addition to or greater than those being levied at the date hereof are hereafter levied and Seller is liable for the payment or collection of such additional or greater tax, so long as such additional or greater tax is in effect and paid by Seller on such gas, Buyer will reimburse Seller for three-fourths (¾) of the amount by which such additional or greater tax shall exceed the taxes now levied.

Buyer shall reimburse Seller the amounts for which Seller is liable and pays to the State of Louisiana or Federal Government applicable or equivalent to the gathering tax imposed by Act No. 11, Louisiana Laws of 1948, as amended by Act No. 45, Louisiana Laws of 1954, in respect of or applicable to gas delivered hereunder and Buyer will pay or reimburse Seller any and all similar taxes hereafter levied or assessed by Federal or State of Louisiana Laws in respect of or applicable to such gas imposed upon or payable by Seller; provided, however, that during any time when the amount of such taxes is in excess of the amount of tax levied by said Act No. 11, Louisiana Laws of 1948, Buyer shall be obligated hereunder to pay or reimburse Seller only three-fourths (¾) of such excess. The amount for which reimbursement is to be made by Buyer to Seller under this paragraph shall be billed quarterly.

Notwithstanding any provision of this contract to the contrary, if, in order to comply with or by reason of any present or future law or rule, regulation or order of [501] the Secretary of the Interior, the Commissioner of Conservation of the State of Louisiana, or other govern-

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mental officials or bodies having jurisdiction, the basis or method of measurement of gas delivered hereunder is changed, then the price per MCF for gas purchased hereunder shall be adjusted to compensate for the change in the basis or method of measurement, to the end that the total amount of money payable for volumes of gas purchased according to the measurement provisions set forth herein shall remain unaffected by such change of basis or method of measurement.

11. *Billings and Payments:*

(a) On or before the 15th day of each month after deliveries of gas are commenced Seller shall render Buyer a statement for the preceding month showing the volume of gas delivered hereunder, or the volume Buyer was obligated to take or pay for hereunder, the amount due therefor and information sufficient to explain and support any adjustments in volumes made by Seller in determining the amount billed.

(b) Buyer will pay Seller at the address as shown in Section 17 hereof, on or before the 25th day of each month, or as to statements rendered after the 15th, within ten (10) days after receipt of such statements, for gas which Buyer was obligated to take but did not take, and for gas delivered during the preceding month, according to the measurements, computations and prices herein provided. If the correct amount is not paid when due, interest on any unpaid amount shall accrue at the rate of six per cent (6%) per annum. If such default continues after sixty (60) days after written notice from Seller to Buyer, Seller

may suspend gas deliveries hereunder without prejudice to other remedies.

(c) If any overcharge or undercharge in any form whatsoever shall be found within two (2) years and the bill therefor has been paid, Seller shall refund the amount of the overcharge received by Seller and Buyer shall pay the amount of the undercharge with thirty (30) days after final determination thereof.

(d) If for any month Buyer pays for gas not received Buyer may credit such payment against payments due hereunder at time of actual delivery for quantities taken in excess of the contract quantity for any month or months within twelve (12) months after such payment is made for gas not received.

12. *Warranty of Title to Gas*—Seller warrants title to all gas delivered hereunder by it, that it has the right to sell the same, and that such gas is free from liens and adverse claims of every kind. Seller will pay or cause to be paid, all royalties, taxes and other sums due on production, gathering or handling of the gas delivered by such Seller. Seller will indemnify and save Buyer harmless against all loss, damage and expense of every character on account of adverse claims to the gas delivered by it or of royalties, taxes, payments or other charges thereon applicable before or upon delivery to Buyer.

13. *Force Majeure*—If either Buyer or Seller is rendered unable, wholly or in part, by force majeure or any other cause of any kind not reasonably within its control to perform or comply with any obligation or condi-

tion of this contract, upon giving notice and reasonably full particulars to the other party or parties such obligation or condition shall be suspended during the continuance of the inability so caused and such party shall be relieved of liability and shall suffer no prejudice for failure to perform the same during such period; provided obligations to make payments then due [502] hereunder shall not be suspended and the cause of suspension (other than strikes or lockouts) shall be remedied so far as possible with reasonable dispatch. Settlement of strikes and lockouts shall be wholly within the discretion of the party having the difficulty. The term "force majeure" shall include, without limitation by the following enumeration, acts of God and the public enemy, the elements, fire, accidents, breakdowns, strikes and any other industrial, civil or public disturbance, inability to obtain materials, supplies, permits or labor, any act or omission (including failure to take gas) of a purchaser of gas from Buyer which is excused by any event or occurrence of the character herein defined as constituting force majeure, temporary failure of gas supply, and any laws, orders, rules, regulations, act or restraints of any government or governmental body or authority, civil or military.

14. *Regulatory Bodies*—This contract shall be subject to all valid applicable State and Federal Laws, and orders, directives, rules and regulations of any governmental body or official having jurisdiction.

15. *Arbitration*—Any controversy, except those involving legal questions, between the parties arising under this

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contract not resolved by agreement shall be determined by a board of arbitration upon notice of submission given either by Buyer or Seller, which request shall also name one arbitrator. The party receiving such notice shall, within ten (10) days thereafter, by notice to the other, name the second arbitrator, or failing so to do, the party giving notice of submission shall name the second. The two (2) arbitrators so appointed shall name the third, or failing so to do within ten (10) days, the third arbitrator may be appointed by the person who is at the time the senior (in service) judge of the United States District Court for the Western District of Louisiana.

The arbitrators selected to act hereunder shall be qualified by education, experience, and training to pass upon the particular question in dispute. Therefore, it is agreed that if an engineering question is involved, qualified engineers shall be appointed, and similar procedure will be followed in connection with other questions.

The arbitrators so appointed shall promptly hear and determine (after giving the parties due notice of hearing and a reasonable opportunity to be heard) the questions submitted, and shall render their decision within sixty (60) days after appointment of the third arbitrator. If within said period a decision is not rendered by the board or a majority thereof, new arbitrators may be named and shall act hereunder at the election of either Buyer or Seller in like manner as if none had been previously named.

The decision of the arbitrators, or of a majority thereof, made in writing shall be final and binding upon the parties hereto as to the questions submitted and the parties will

abide by and comply with such decision. The expenses of arbitration, including reasonable compensation to the arbitrators, shall be borne equally by Buyer and Seller, except that each such party shall bear the compensation and expenses of its counsel, witnesses and employees.

16. *Term of Contract*—Subject to the other provisions of this agreement, this contract shall be in force from its date for a term expiring November 1, 1977, and from year to year thereafter until terminated by either party upon six (6) months' written notice delivered prior to any following anniversary date, or as such term may be otherwise extended hereunder.

[503] 17. *Miscellaneous:*

(a) No waiver by Buyer or Seller of any default of the other under this contract shall operate as a waiver of any future default, whether of like or different character.

(b) This agreement shall bind and inure to the respective successors and assign of the parties hereto; but no assignment shall relieve either party's obligations hereunder without the written consent of the other party or parties.

(c) Every notice, request, statement or bill provided for in this contract shall be in writing directed to the party to whom given, made, or delivered at such party's address as follows:

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Buyer: Tennessee Gas Transmission Company
Commerce Building
Houston, Texas

Seller: Continental Oil Company
P. O. Box 2197
Houston, Texas

or at such other post office address as such party shall from time to time designate as the address for such purpose by registered letter addressed to the other party or parties.

IN WITNESS WHEREOF, this instrument is executed in two (2) counterparts, each of which shall be an original, as of the date first above mentioned.

TENNESSEE GAS TRANSMISSION COMPANY

By WM. W. WITMER
Vice President

[SEAL] BUYER

ATTEST:

B. J. WILLIAMSON
Assistant Secretary

CONTINENTAL OIL COMPANY

By O. L. FISHER
Vice President

[SEAL] SELLER

ATTEST:

RICHARD JACKSON
Assistant Secretary

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[504] EXHIBIT "A"—GAS PURCHASE AND SALES AGREEMENT

CONTINENTAL OIL COMPANY—SELLER

TENNESSEE GAS TRANSMISSION COMPANY—BUYER

I. LEASES.

A. West Cameron Area (Outer Continental Shelf Leasing Map, Louisiana Map No. 1):

1. Continental File No. 41538—State of Louisiana Lease No. 1654, OCS Lease No. 0188. Lease dated November 19, 1948, executed by the State Mineral Board for the State of Louisiana, as Lessor, and Continental Oil Company, The Atlantic Refining Company, Tide Water Associated Oil Company and Cities Service Oil Company, as Lessees, covering Block No. 191-S/2, containing approximately 2,500 acres.

2. Continental File No. 41540—State of Louisiana Lease No. 1656, OCS Lease No. 0190. Lease dated November 19, 1948, executed by the State Mineral Board for the State of Louisiana, as Lessor, and Continental Oil Company, The Atlantic Refining Company, Tide Water Associated Oil Company and Cities Service Oil Company, as Lessees, covering Block No. 192-S/2, containing approximately 2,500 acres.

3. Continental File No. 41541—State of Louisiana Lease No. 1657, OCS Lease No. 0191. Lease dated

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November 19, 1948, executed by the State Mineral Board for the State of Louisiana, as Lessor, and Continental Oil Company, The Atlantic Refining Company, Tide Water Associated Oil Company and Cities Service Oil Company, as Lessees, covering Block No. 193-N/2, containing approximately 2,500 acres.

4. Continental File No. 41542—State of Louisiana Lease No. 1658, OCS Lease No. 0192. Lease dated November 19, 1948, executed by the State Mineral Board for the State of Louisiana, as Lessor, and Continental Oil Company, The Atlantic Refining Company, Tide Water Associated Oil Company and Cities Service Oil Company, as Lessees, covering Block No. 193-S/2, containing approximately 2,500 acres.

5. Continental File No. 41543—State of Louisiana Lease No. 1659, OCS Lease No. 0193. Lease dated November 19, 1948, executed by the State Mineral Board for the State of Louisiana, as Lessor, and by the Continental Oil Company, The Atlantic Refining Company, Tide Water Associated Oil Company and Cities Service Oil Company, as Lessees, covering Block No. 194-N/2, containing approximately 2,500 acres.

B. East Cameron Area (Outer Continental Shelf Leasing Map, Louisiana Map No. 2):

1. Continental File No. 36767—State of Louisiana Lease No. 1192, OCS Lease No. 0154. Lease dated

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July 19, 1947, executed by the State Mineral Board for the State of Louisiana, as Lessor, and Continental Oil Company, The Atlantic Refining Company, Tide Water Associated Oil Company and Cities Service Oil Company, as Lessees, covering Block No. 49, containing approximately 5,000 acres.

[505] 2. Continental File No. 36768—State of Louisiana Lease No. 1193, OCS Lease No. 0155. Lease dated July 19, 1947, executed by the State Mineral Board for the State of Louisiana, as Lessor, and Continental Oil Company, The Atlantic Refining Company, Tide Water Associated Oil Company and Cities Service Oil Company, as Lessees, covering Block No. 50, containing approximately 5,000 acres.

3. Continental File No. 36769—State of Louisiana Lease No. 1194, OCS Lease No. 0156. Lease dated July 19, 1947, executed by the State Mineral Board for the State of Louisiana, as Lessor, and Continental Oil Company, The Atlantic Refining Company, Tide Water Associated Oil Company and Cities Service Oil Company, as Lessees, covering Block No. 51, containing approximately 5,000 acres.

4. Continental File No. 36770—State of Louisiana Lease No. 1196, OCS Lease No. 0157. Lease dated July 19, 1947, executed by the State Mineral Board for the State of Louisiana, as Lessor, and

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Continental Oil Company, The Atlantic Refining Company, Tide Water Associated Oil Company and Cities Service Oil Company, as Lessees, covering Block No. 58, containing approximately 5,000 acres.

5. Continental File No. 36771—State of Louisiana Lease No. 1197, OCS Lease No. 0158. Lease dated July 19, 1947, executed by the State Mineral Board for the State of Louisiana, as Lessor, and Continental Oil Company, The Atlantic Refining Company, Tide Water Associated Oil Company and Cities Service Oil Company, as Lessees, covering Block 59, containing approximately 5,000 acres.

6. Continental File No. 36774—State of Louisiana Lease No. 1200, OCS Lease No. 0159, Lease dated July 19, 1947, executed by the State Mineral Board for the State of Louisiana, as Lessor, and Continental Oil Company, The Atlantic Refining Company, Tide Water Associated Oil Company and Cities Service Oil Company, as Lessees, covering Block 62, containing approximately 5,000 acres.

7. Continental File No. 36775—State of Louisiana Lease No. 1201, OCS Lease No. 0160. Lease dated July 19, 1947, executed by the State Mineral Board for the State of Louisiana, as Lessor, and Continental Oil Company, The Atlantic Refining Company, Tide Water Associated Oil Company

and Cities Service Oil Company, as Lessees, covering Block No. 63, containing approximately 5,000 acres.

8. Continental File No. 36776—State of Louisiana Lease No. 1204, OCS Lease No. 0161. Lease dated July 19, 1947, executed by the State Mineral Board for the State of Louisiana, as Lessor, and Continental Oil Company, The Atlantic Refining Company, Tide Water Associated Oil Company and Cities Service Oil Company, as Lessees, covering Block 67, containing approximately 5,000 acres.

9. Continental File No. 36779—State of Louisiana Lease No. 1207, OCS Lease No. 0162. Lease dated July 19, 1947, executed by the State Mineral Board for the State of Louisiana, as Lessor, and Continental Oil Company, The Atlantic Refining Company, Tide Water Associated Oil Company and Cities Service Oil Company, as Lessees, covering Block No. 70, containing approximately 5,000 acres.

[506] 10. Continental File No. 36780—State of Louisiana Lease No. 1208, OCS Lease No. 0163. Lease dated July 19, 1947, executed by the State Mineral Board for the State of Louisiana, as Lessor, and Continental Oil Company, The Atlantic Refining Company, Tide Water Associated Oil Company and Cities Service Oil Company, as Lessees, covering Block No. 71, containing approximately 5,000 acres.

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11. Continental File No. 41534—State of Louisiana Lease No. 1625, OCS Lease No. 0184. Lease dated November 19, 1948, executed by the State Mineral Board for the State of Louisiana, as Lessor, and Continental Oil Company, The Atlantic Refining Company, Tide Water Associated Oil Company and Cities Service Oil Company, as Lessees, covering Block No. 72, containing approximately 5,000 acres.

12. Continental File No. 41537—State of Louisiana Lease No. 1632, OCS Lease No. 0187. Lease dated November 19, 1948, executed by the State Mineral Board for the State of Louisiana, as Lessor, and Continental Oil Company, the Atlantic Refining Company, Tide Water Associated Oil Company and Cities Service Oil Company, as Lessees, covering Block No. 83-NW/4, containing approximately 1,250 acres.

C. Vermilion Area (Outer Continental Shelf Leasing Map, Louisiana Map No. 3):

1. Continental File No. 38635—State of Louisiana Lease No. 1371, OCS Lease No. 0167. Lease dated March 15, 1948, executed by the State Mineral Board for the State of Louisiana, as Lessor, and Continental Oil Company, as Lessee, covering Block No. 95-W/2, containing approximately 2,500 acres.

2. Continental File No. 38637—State of Louisiana Lease No. 1372, OCS Lease No. 0169. Lease

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dated March 15, 1948, executed by the State Mineral Board for the State of Louisiana, as Lessor, and Continental Oil Company, The Atlantic Refining Company, Tide Water Associated Oil Company and Cities Service Oil Company, as Lessees, covering Block No. 96, containing approximately 5,000 acres.

3. Continental File No. 38636—State of Louisiana Lease No. 1373, OCS Lease No. 0168. Lease dated March 15, 1948, executed by the State Mineral Board for the State of Louisiana, as Lessor, and Continental Oil Company, The Atlantic Refining Company, Tide Water Associated Oil Company and Cities Service Oil Company, as Lessees, covering Block No. 108, containing approximately 5,000 acres.

4. Continental File No. 38970—State of Louisiana Lease No. 1443, OCS Lease No. 0170. Lease dated May 10, 1948, executed by the State Mineral Board for the State of Louisiana, as Lessor, and Continental Oil Company. The Atlantic Refining Company, Tide Water Associated Oil Company and Cities Service Oil Company, as Lessees, covering Block No. 75-N/2 and SW/4 containing 3,750 acres.

5. Continental File No. 38971—State of Louisiana Lease No. 1444, OCS Lease No. 0171. Lease dated May 10, 1948, executed by the State Mineral Board for the State of Louisiana, as Lessor,

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and Continental Oil Company, The Atlantic [507] Refining Company, Tide Water Associated Oil Company and Cities Service Oil Company, as Lessees, covering Block No. 78-N/2, containing approximately 2,500 acres.

6. Continental File No. 38973—State of Louisiana Lease No. 1446, OCS Lease No. 0172. Lease dated May 10, 1948, executed by the State Mineral Board for the State of Louisiana, as Lessor, and Continental Oil Company, The Atlantic Refining Company, Tide Water Associated Oil Company and Cities Service Oil Company, as Lessees, covering Block No. 86, containing approximately 5,000 acres.

7. Continental File No. 38974—State of Louisiana Lease No. 1447, OCS Lease No. 0173. Lease dated May 10, 1948, executed by the State Mineral Board for the State of Louisiana, as Lessor, and Continental Oil Company, The Atlantic Refining Company, Tide Water Associated Oil Company and Cities Service Oil Company, as Lessees, covering Block No. 87-S/2, containing approximately 2,500 acres.

Continental Oil Company owns 25% interest in the above described leases.

II. Dedication

[508] A. Reservoirs in East Cameron and West Cameron Areas:

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Continental Oil Company's interest in leases described in Section I, Subsections A and B of this Exhibit "A" is dedicated insofar, but only insofar, as the leases cover and include a reservoir or reservoirs discovered by the date of this agreement, which reservoirs are identified below by sand intervals, as measured from conventional electric logs, encountered and identified in respective wells, as follows:

Sand Interval Measured from Conventional Electric Log	Well in which Sand Interval is Identified
4451 - 4592	192 B-1
4642 - 4792	192 B-1
4897 - 4992	192 B-1
5182 - 5196	192 A-1
5550 - 5608	192 B-1
5987 - 6040	191 A-4
5826 - 5944	192 B-1
6110 - 6129	192 B-1
6212 - 6238	192 B-1
6585 - 6667	192 B-1
6968 - 6990	192 A-1
7241 - 7270	192 A-1
7811 - 7833	191 A-4
7807 - 7827	192 A-1
8080 - 8098	192 A-1
8225 - 8313	192 A-1
8796 - 8867	192 A-1
9215 - 9255	194 A-2
9483 - 9552	192 B-1
5278 - 5446	49 A-2
6007 - 6074	49 A-2
6488 - 6498	49 A-2
6680 - 6687	49 A-2

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Sand Interval Measured from Conventional Electric Log	Well in which Sand Interval is Identified
7174 - 7322	49 A-2
7888 - 7910	49 A-2
8296 - 8308	49 A-2
9970 - 9991	49 A-2
10073 - 10082	49 A-2
10594 - 10645	49 A-2
11080 - 11099	49 A-2
7005 - 7045	66 A-2
6397 - 6410	62 A-1
6845 - 6853	62 A-1
7126 - 7186	62 A-1
7935 - 8027	66 A-2
7621 - 7765	62 A-1
4061 - 4072	71 A-1
6831 - 6839	72 A-2
[509] 6579 - 6589	71 A-1
6686 - 6701	71 A-1
7129 - 7176	71 A-1
7497 - 7591	72 A-1
7470 - 7480	71 A-1
7594 - 7682	71 A-1
8063 - 8103	71 A-1
8443 - 8467	71 A-1
8831 - 8866	72 A-2
8896 - 8920	71 A-1
8999 - 9067	71 A-1

B. Reservoirs by depths in Vermilion Area:

Continental Oil Company's interest in leases described in Section 1, Subsection C of this Exhibit "A" is dedicated insofar, but only insofar, as they cover and include a reservoir or reservoirs which

Item No. A, Gas Purchase and Sales Agreement, Dated August 17, 1956, Between Tennessee Gas Transmission Company, as Buyer and Continental Oil Company, as Seller

may be encountered or discovered above 11,000 feet (measured true vertical depth) below the seabed, provided that where a reservoir is first encountered or discovered in the discovery well at a greater depth than 11,000 feet below the seabed, such reservoir will not be dedicated even though subsequent drilling establishes that a part of the reservoir is above 11,000 feet below the seabed.

C. Maximum Volume:

Continental Oil Company's dedication of reservoirs and reservoirs which may be discovered above certain depths, as set out in Section II, Subsection A and B of this Exhibit "A", is limited to a maximum volume of 25% of two trillion cubic feet of gas. Volumes of gas which Continental Oil Company may own in the dedicated reservoirs in excess of the maximum volume dedicated hereunder shall be excepted from the dedication.

• • •

Notice of Intervention of Public Service Commission of the State of New York, Docket Nos. G-11024, *et al.*, Filed October 22, 1956

* * *

[669] The Public Service Commission of the State of New York, a regulatory body of the State of New York having jurisdiction to regulate rates and charges for the sale of natural gas within said State, hereby gives notice that it intervenes in this proceeding.

Dated: Albany, New York
October 19, 1956

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

By /s/ KENT H. BROWN
Kent H. Brown
Counsel
55 Elk Street
Albany, New York

* * *

Order Permitting Interventions, Docket Nos. G-11024, *et al.*, Issued February 27, 1957

* * *

[694] Continental Oil Company, *et al,* (Applicants) have separately applied in the above-entitled proceedings for certificates of public convenience and necessity authorizing sales of natural gas in interstate commerce by Applicants to Tennessee Gas Transmission Company (Tennessee) for resale. By notice issued October 3, 1956 and published in the Federal Register on October 11, 1956 (21 FR 7783-84), these separate proceedings were consolidated and October 19, 1956 was fixed as the last day for filing protests or petitions to intervene.

Separate petitions for leave to intervene have been filed in the above-captioned consolidated proceeding by the Petitioners tabulated below as indicated. In addition, the Public Service Commission of the State of New York filed a notice of intervention on October 22, 1956.

Petitioner	Date Filed
Brooklyn Union Gas Company	10/18/56
Long Island Lighting Company	10/18/56
Lake Shore Pipe Line Co.	10/19/56
Tennessee Gas Transmission Company	10/19/56
Public Service Electric and Gas Company	2/20/57

The Commission finds:

(1) That although the New York Public Service Commission and the Public Service Electric and Gas Company did not file within the time required by Section 1.8 (d) of the Commission's Rules of Practice and Procedure, good cause has been shown to permit such late filings.

[695] (2) That the participation of the above-listed Petitioners and the New York Public Service Commission in the instant proceedings may be in the public interest

Order Permitting Interventions, Docket Nos. G-11024, et al., Issued February 27, 1957

The Commission orders:

That the above-listed Petitioners and the New York Public Service Commission be and the same hereby are permitted to become Interveners in the above-captioned consolidated proceeding, subject to the rules and regulations of the Commission; *Provided, however,* That the participation of Petitioners as Interveners shall be limited to matters affecting asserted rights and interests specifically set forth in their respective petitions for leave to intervene; and *Provided, further,* That the admission of Petitioners and the New York Public Service Commission as Interveners shall not be construed as recognition by the Commission that they or any of them might be aggrieved because of any order or orders of the Commission entered in such proceeding.

By the Commission.

J H GUTRIDE
Joseph H. Gutride,
Secretary.

Motion of New York Commission for Consolidation, Docket Nos. G-11024, *et al.*, Filed March 19, 1957

* * * *

[709] Comes now the Public Service Commission of the State of New York, an intervener in each of the above entitled dockets, and respectively moves that the above entitled dockets be consolidated for hearing. In support of said motion the New York Commission respectfully shows:

1. The first four of the above numbered dockets (hereinafter referred to as the CATCO dockets) each involves an application for a certificate of convenience and necessity pursuant to Section 7(c) of the Natural Gas Act for authority to make a sale to Tennessee Gas Transmission Company from off-shore points in Louisiana. Each of these four dockets has been consolidated for hearing and hearings have been held therein on February 28 and March 1, 1957.

2. The proceeding at Docket No. G-11107 involves an application for a certificate of public convenience and necessity pursuant to Section 7(c) of the Natural Gas Act for authority for Tennessee to construct some $167,000,000 of additional facilities in order to increase its capacity approximately 450,000 Mcf per day.

[710] 3. Over 90% of Tennessee's additional reserves in G-11107 are to be provided from the CATCO reserves involved in CATCO dockets. Over $16,000,000 of the construction relates directly to the construction of facilities from the off-shore points to Tennessee's system at Kinder, Louisiana. Of the balance of Tennessee's proposed construction it is impossible to determine at this point what portion is applicable wholly or in part to the acquisition of the CATCO reserves.

Motion of New York Commission for Consolidation, Docket Nos. G-11024, et al., Filed March 19, 1957

4. It is evident that the economic feasibility of the proposals in the CATCO dockets is inextricably bound up with the proposals involved in G-11107.

5. Prior Federal Power Commission procedure in such matters until recently has been to consolidate the related pipeline and independent producer Section 7 applications. E.g. *Matter of Tamborello, et al.*, Docket No. G-3045, et al., *Matter of Tennessee Gas Transmission Company, et al.*, Docket No. G-8805, et al. While there have been a few deviations in this procedure quite recently, in each case the pipeline docket was heard first and had either reached completion or near completion before the producer docket was set for hearing. E.g. *Matter of Coastal Transmission Company, et al.*, Docket No. G-9960, et al.

6. In the CATCO dockets here involved, the Examiner has ruled that the opposing interveners might not go into the subject of what portion of the proposed $167,000,000 of facilities related directly to the gas which is the subject of the CATCO dockets. [711] *A fortiori* it would be impossible to determine the economic feasibility of the proposed sale by CATCO and purchase for Tennessee in the CATCO dockets.

7. It is evident that a sale of gas does not exist in abstract wholly divorced from the related purchase. The Commission's staff itself has noted the interrelationship of the producer and pipeline dockets and has recommended that the Tennessee application be consolidated with the CATCO dockets. See memorandum to the Commission from Bureau of Rates and Gas Certificates dated February 4, 1957.

Motion of New York Commission for Consolidation, Docket Nos. G-11024, et al., Filed March 19, 1957

WHEREFORE, the Public Service Commission of the State of New York respectfully moves that the above entitled CATCO dockets be consolidated with the related pipeline docket for purposes of hearing and decision.

Respectfully submitted

PUBLIC SERVICE COMMISSION OF STATE OF NEW YORK
By /s/ KENT H. BROWN
KENT H. BROWN
Counsel
55 Elk Street
Albany 1, N. Y.

MORTON L. SIMONS
Of Counsel

(Sworn to March 18, 1957.)

• • •

Presiding Examiner's Decision Upon Applications for Certificate of Public Convenience and Necessity, Filed Pursuant to Section 7 (c) of the Natural Gas Act, Docket Nos. G-11024, *et al.*, Issued March 29, 1957

* * *

[744] SIMPSON, PRESIDING EXAMINER: The proceeding arises under the certificate provisions of Section 7 (c) of the Natural Gas Act (Act).

By separate applications filed in each of the dockets appearing in the caption, above, September 5, 1956, September 7, 1956, September 10, 1956 (latter two dockets), respectively; Continental Oil Company (Continental), The Atlantic Refining Company (Atlantic), Cities Service Production Company (Cities), and Tidewater Oil Company (Tidewater) applied for statutory authorization to sell natural gas from leases in the West Cameron, East Cameron and Vermilion areas, in the Gulf of Mexico, offshore the coast of Cameron and Vermilion parishes, Louisiana, to Tennessee Gas Transmission Company (Tennessee) pursuant to separate contracts between each one of them and Tennessee, dated, respectively, August 17, 1956 (Continental-Tennessee contract), August 10, 1956 (Atlantic-Tennessee contract), August 14, 1956 (Cities-Tennessee contract, and Tidewater-Tennessee contract).

[745] On October 3, 1956, the Secretary duly issued a "Notice of Applications" pertaining to the above filings, which directed that these related matters should be heard on a consolidated record, and on February 8, 1957, issued a "Notice of Hearing". Pursuant to these notices and upon appropriate publication and service thereof the hearing thus provided was duly held, commencing February 28, 1957, and concluding the following day, concerning the matters involved and the issues presented by these applications.

By order issued February 27, 1957, the Commission permitted intervention by the petitioners Tennessee Gas

Transmission Company (Tennessee), The Brooklyn Union Gas Company (Brooklyn), Long Island Lighting Company (Long Island), Public Service Electric and Gas Company (Public Service), Lake Shore Pipe Line Company (Lake Shore), and permitted late filing by the New York Public Service Commission (New York) of the latter's notice of intervention received by the Commission October 22, 1956. All of the interveners actively participated in the proceedings, some throughout the hearing until the conclusion thereof on the second day. Initial and reply briefs have been filed by or on behalf of all participants, including Applicants, interveners, and the Commission's staff.[1]

By order issued March 8, 1957, the Commission denied a motion made by Applicants at the conclusion of the hearing on March 1, 1957, to omit the intermediate decision procedure.

The Issues

The basic issues are those presented in certificate proceedings had under Section 7 (c) and (e) of the Act, to-wit:

(a) Is the Applicant, each of them, duly qualified and able and willing properly to do the acts and to perform the service proposed and to conform to the provisions

[1] The applicants Atlantic and Cities filed a joint initial memorandum brief as did the applicants Continental and Tidewater. Counsel for the Public Service Commission complains in his initial brief of "the inadequate time set by the Examiner for the filing of initial briefs." As this counsel was one of those who did not attend the concluding portion of the hearing on the second day and no one spoke for him, the Presiding Examiner was unadvised as to any further situations concerning him which might have been entitled to consideration in connection with the determination of the time for filing briefs.

of the Act and the requirements, rules, and regulations of the Commission thereunder;

[746] (b) Is, or will, the proposed service, sale, or operation required, or be required, by the present or future public convenience and necessity.

CONTENTIONS

Applicants.

The Applicants contend to the effect: that the record shows that based upon sizable reserves as well as potentials, Applicants are able to perform the service proposed; that Applicants' willingness to perform is established by the consummation of the contracts of sale with Tennessee, by the prosecution of the several applications, and by the evidence of record; and that the present and future public convenience and necessity require issuance of the certificates in order that the subject reserves may be used to supply the expansion and demands of Tennessee's markets; that the initial price to be charged under the contracts will not exert a disruptive effect on other contracts, will not trigger other Tennessee contracts, and will not precipitate the filing by Tennessee for an increase in its rates.[2] Applicants aver that if they are unable to

[2] In contending that the determination of a just and reasonable rate is left under the Act to Section 4 and Section 5 proceedings and is not to be determined thereunder in a Section 7 proceeding, the Applicants Continental and Tidewater point out that there is now pending under the Commission order of January 27, 1956 a Section 5 (a) proceeding against Atlantic and Tidewater (G-9283 and G-9284) and the Applicant Continental, *et al.* (G-9279), with respect both to rates in effect and those proposed to be made, and further contend that the same are entitled to have their rates tested in such pending proceedings with all of the procedural safeguards which are attendant thereon, and that it would be contrary to the public interest to turn these certificate proceedings into rate proceedings.

secure certificates within the time as shown by the record to be required, they will have no alternative but to market the gas elsewhere or face the loss of their properties; and that conditioning Applicants' certificates upon the final granting of a certificate to Tennessee to construct facilities to transport the gas to shore, as proposed by Tennessee in Docket No. G-11,107 can serve no useful purpose and would in effect be the same as refusing Applicants their certificates.

As to a condition proposed by Staff counsel dealing with the transportation of liquefiable hydrocarbons by Tennessee for Applicants from offshore platforms to points on shore, the latter (Continental and Tidewater) contend that this is a matter that can properly be considered in future rate cases involving the price to be charged by Applicants under the contracts and that if it should appear at any time that the transportation arrangement imposes any burden upon Tennessee's [747] consumers proper adjustments may then be made after a complete review of all rate factors.

Interveners

Tennessee Gas Transmission Company. This intervenor supports the applications for certificates and contends, in substance: that the gas reserves involved are well located in relation to Tennessee's system, affords the latter an entry into offshore areas of large gas reserves, places Tennessee in a favorable position to acquire large reserves to be developed in the future, and enables the latter to continue to meet the expanding demands of its markets; that the volumes of gas specified in the contracts can

be delivered to Tennessee; that the gas to be delivered will be of high quality; that the construction by Tennessee of the facilities required to bring the gas from Applicants offshore platforms to the Tennessee's main line at Kinder, Louisiana, is feasible; that under valid assumptions the effect of the instant contracts on Tennessee's 1958 weighted average cost of gas is an increase of but 0.97 cents per Mcf; that under the authority of alleged holdings of the Commission in previous cases the justness and reasonableness of prices to be paid under gas purchase contracts should not be inquired into in producer certificate cases; and that the proposed sales of the Applicants, together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, are required by the public convenience and necessity, and certificates therefor should here issue. Tennessee avers that the price provisions in the contracts involved here do not trigger any of Tennessee's existing favored nation or renegotiation clauses contained in its other gas purchase contracts, nor, as far as the evidence discloses, any such clauses contained in the contracts of any other company.

Other Interveners. In general the intervention of the intervener customers of Tennessee rests basically upon an asserted interest in the effect the prices to be paid by Tennessee for the gas proposed to be purchased herein, and the terms and conditions of the contract pertaining thereto, will have on the price charged by Tennessee for gas sold by it to interveners.[3] Considered as a group

[3] Brooklyn and Long Island state that neither is seeking additional quantities of firm gas from Tennessee in the latter's pending certificate proceeding (G-11,107) relating to market expansion and the use of the additional supplies of natural gas here involved.

the contentions of these interveners are to the effect:

[748] that Applicants have failed to justify the proposed price of gas to Tennessee; that once the Commission certificates these Applicants and Tennessee begins taking gas from the reserves interveners will be powerless to attack the price for such gas in any future rate proceeding; that the evidence presented does not show what the effect of the purchase of gas under these four contracts will be on Tennessee's over-all cost of gas delivered in its main system ashore or on Tennessee's rates to customers; that Applicants offered no evidence to justify the proposed initial price, allegedly the highest yet known in the Southwestern United States; that the Applicants have thus failed to meet the statutory requirements for the issuance of certificates under Section 7 (c) of the Act;[4] and that, accordingly, the Commission cannot properly reach a determination that the proposed service is in the public interest and required by the public convenience and necessity. Interveners aver that the shelf-land covered by the leases is within the offshore area in dispute between the Federal Government and the State of Louisiana and depending in part upon the resolution of that controversy the leases might be bound to be within an established pricing area and would thus eventually trigger the favored nations clauses of some 20 of Tennessee's existing contracts in the Southwestern Louisiana pricing area. Interveners also contend as the evi-

[4] The intervener Lake Shore states that there is no question, insofar as it is concerned, as to the ability and willingness of the Applicants to perform (M. Br., p. 3). Brooklyn and Long Island emphasize the rate aspects. The intervener Public Service directly raises the issue of "able and willing properly to do the acts and to perform the service proposed" (M. Br., pp. 9-10).

dence indicates that an extension of Tennessee's existing pipe line is required (G-11,107), to take deliveries of gas under Applicants contracts herein the equities involved require that any certificates issued should be conditioned upon the granting of a certificate to Tennessee for the said extension (M. Br., p. 28, Brooklyn Union and Long Island; M. Br., p. 11, Public Service); and that the present or future public convenience and necessity also require the Commission to attach a rate condition to such certificates of such nature as to prevent the establishment of a new peak price of gas in the area and thus discourage the "leap-frogging" (price-wise) which will inevitably follow these transactions unless the Commission takes such action. (M. Br., Public Service, p. 20), one requesting that the condition provide a rate not to exceed the rates which Tennessee is presently paying for natural gas produced by Applicants in the so-called West Delta, Louisiana, offshore area (M. Br., p. 14, Lake Shore).

[749] The brief of the New York Public Service Commission as to the merits follows substantially the contentions of the immediately preceding interveners. This brief also contains additional and otherwise surprising matter in the nature of allegations essentially misstating the manner in which the hearing was conducted, with respect to which the appropriate reply of counsel for the Applicants Continental and Tidewater (R. Br., p. 20) and Atlantic and Cities (R. Br., pp. 2-3) and the intervener Tennessee (R. Br., p. 2, n. 2) constitute sufficient answers and a basis for giving the further consideration thereto in this decision.

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Staff Counsel

Staff counsel submits that Applicants are able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules and regulations of the Commission thereunder; and that the proposed sale of natural gas by Applicants to Tennessee is or will be required by the present or future public convenience and necessity; and recommends, substantially, that Applicants be issued their certificates of public convenience and necessity.

Staff counsel contends that no question or issue of rates is involved in this proceeding, on the ground that at such time as Tennessee proposes an increase in rates or it can be shown that Applicants' rates have a consequential and material effect upon the rates of Tennessee, the question of the justness and reasonableness of Applicants' rates may be investigated and passed upon in a proper proceeding. Counsel further contends, in effect, that the question of any need for remuneration to Tennessee for the transportation by it of liquid hydrocarbons for Applicants from offshore to shore locations, should be held in abeyance until such time as Tennessee proposes to actually transport, but proposes that an order issuing the certificates contain an appropriate reservation in the premises.

DISCUSSION

[750] *Jurisdiction*

Each Applicant concedes, in substance, that on information and belief, all or a portion of the gas to be sold by the respective Applicant will be transported by Tennessee

in interstate commerce for resale, for ultimate public consumption, and such is effectually disclosed in the evidence.

Contentions by the Applicants that they are not subject to the Commission's jurisdiction are answered in the Commission's Opinion No. 284, in *Matters of Deep South Oil Company of Texas, et al.* (G-2952, etc.) and Opinion No. 285 in *Matters of Dixie Pipe Line Company, et al.* (G-2401, etc.) which require the finding and conclusion in this proceeding that the sales of natural gas proposed by Applicants will be sales in interstate commerce for resale within the jurisdiction of the Commission, and that Applicant will thereby be a "natural-gas company" within the meaning of the Act.

The Merits

Continental is a major oil and gas company with substantial assets. The other three companies also are substantial operators in oil and gas. It satisfactorily appears that none of these companies own any interest in any one of the other and there is no affiliation between them.

In the event satisfactory certificates are issued within the time provided in the contracts, which are the subject of this proceeding, Continental will be ready, willing and able to perform its obligations under its contract with Tennessee and the other three applicants are likewise ready, willing and able to carry out their agreements with Tennessee.

Though these matters are testified to solely by Continental's land superintendent in charge of the latter's

marine or offshore region, on the basis of advice received from others his responsibilities and duties with respect to the business of supervision and development of leases, with or without joint interests present, which are inferred to relate to such matters, and his position in the company with respect to exploration, are deemed to remove his testimony from the realm of pure or uncorroborative hearsay to that of reasonably reliable and probative evidence as to matters on which Continental relies in conducting its day to day business. Further, Applicants' counsel offered to produce further witnesses as desired by cross-examining counsel, but was not requested or advised to do so.

[751] Continental, Atlantic, Tidewater and Cities[5] own each an undivided quarter interest in the leases here subject to the contract with Tennessee. These leases are located some 15-25 miles offshore in blocks or portions of blocks and total some 95,000 acres. They embrace what appear to be three or more fields located on the Continental shelf in the Gulf of Mexico, in the so-called West Cameron, East Cameron, and Vermillion areas.

The leases were acquired from the State of Louisiana by purchase at sales conducted by the State Mineral Board at Baton Rouge, Louisiana, in 1947 to 1948, and have been continued under Section 6 of the Outer Continental Shelflands Act. It satisfactorily appears that in order to comply with the obligation of the leases and the Shelflands Act, production from the leases should commence by 1958.

[5] Known as the CATC Group, from the initials of the names of the four companies.

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Three of the Applicants have designated Continental as operator of the leases and Continental has created an operating organization within itself known as its CATC Marine Region which conduct the offshore activities for which it is responsible. However, each Applicant has retained to itself responsibility for marketing its own production from its lease interests.

The Contracts.

The basic terms and conditions of the contracts between each of the producer companies and Tennessee are identical. Under the terms of these contracts deliveries to Tennessee are scheduled to commence November 1, 1957. From November 1, 1957 to November 1, 1958, Tennessee will be required to take 175,000 Mcf (or four-fifths of the maximum efficient rate of flow, whichever is less). From and after November 1, 1958, Tennessee will be required to take, or pay for, 1,000 Mcf for every 8,000,000 Mcf of recoverable gas originally in place in the dedicated reserves. Delivery to Tennessee will be effected by or on behalf of the Applicants at the latter's offshore drilling platforms.

The dedication under the contracts is up to a maximum of 2,000,000,000 Mcf with the right to Applicants to dedicate to the contract on or before August 1, 1957, or August 1, 1958, additional gas reserves in the areas[6] up to the amount of 1,000,000,000 Mcf[7], and, subject to several conditions, including an extension of the term [752] of the contract, certain additional reserves

[6] West Cameron, East Cameron, and Vermillion areas.
[7] No additional dedications have been yet effected.

may be dedicated each 12 months during the period August 1, 1958 to August 1, 1967. However, the initial dedication is not only limited to 2,000,000,000 Mcf, but is limited also by lease lines, reservoirs specified in exhibits attached to each contract, and by depth (Vermillion area only).

The gas sold to Tennessee is to be metered on the Applicants' offshore platforms and delivered at the valve on the discharge side of the meter.

Facilities

Other than wells and platforms, facilities owned and operated by or on behalf of Applicants for the purpose of effecting deliveries to Tennessee will include separators and meters on the platforms. Tennessee is to provide the offshore pipeline and will be required to connect up each of Applicants' producing platforms. Applicants will not own or operate a gathering system and will own no facilities, so far as deliveries to Tennessee are concerned, beyond the platforms.[8]

Continental as operator of the leases, will be able to commence deliveries to Tennessee on November 1, 1957 as required by the contract, if Tennessee is granted the certificate applied for by the latter in Docket No. G-11107 in time to construct the facilities necessary to enable it (Tennessee) to accept such deliveries.

To receive gas from nine existing platforms and deliver it to Tennessee's main line system at Kinder, Louisiana, will require the construction by Tennessee of 46.9

[8] Because of directional drilling as a method of developing offshore reserves Applicants may have as many as five wells drilled from one platform.

miles of 26-inch line from Kinder to the shore's edge and 60.8 miles of 26-inch to 12-inch lines thence to the platforms offshore, at an estimated total cost of $16,315,412.[9]

Tennessee is seeking a certificate of public convenience and necessity for these facilities in G-11107 in connection with a proposed general expansion of its system.

Tennessee represents through the testimony of its witnesses that it is willing and able to construct these lateral facilities necessary to receive the gas here involved. It has had experience in the construction of similar offshore facilities in another location off the same coast, and there appears to be no particular technical problems to be confronted in the construction of such facilities which cannot be overcome by normal engineering practices.

[753] However, due to late summer and fall weather conditions usually prevailing in the Gulf, Tennessee must commence construction of the offshore gathering system not later than early spring of this year.

Failure to complete the system in time would place in jeopardy Tennessee's rights under its contracts with Applicants, and so far as the latter relied upon timely completion which failed would place in jeopardy the titles to their leases.

[754] *Tennessee's Requirements for Additional Gas*

Tennessee's vice-president in charge of gas purchases, who represented Tennessee in the lengthy negotiations of

[9] In the event of dedication of additional gas reserves the contracts would require Tennessee to build as much as one mile of offshore lateral gathering line for each 10,000,000 Mcf of gas reserves added up to 100,000,000 Mcf for each of 9 years. This presents no problem here.

the instant contracts, testified that Tennessee's purpose was to obtain gas reserves to supply the expansion of Tennessee's market as shown in Tennessee's pending application in Docket G-11107. *None of the data which it is assumed was filed in support of such application is in evidence in this proceeding.*

Gas Available

Twenty-two wells have been drilled on the leases by the four companies,[10] nine of which are dual completions. Eleven additional wells are programmed for 1957 and there will be further development by drilling in subsequent years. There are nine platforms in place on which there is either a well drilling or one or more wells completed. Two more platforms at least are to be added after production.

Tennessee's gas reserve witness testified that he estimated that the recoverable gas reserves in the three fields under the 95,000 acres dedicated as above set forth[11] totalled some 1,673,929,000 Mcf (14.73 psia).[12] The estimates are derived by using the volumetric method as applied to information obtained from the operator, consisting of descriptions and maps of the leases, and well surveys, with electrical logs, core descriptions, and well test information.

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[10] Four dry holes presumably are not included in this number.

[11] Limited by lease lines, reservoirs, and depth, *supra*. Of the 95,000 acres only 11,500 are in fact proven.

[12] Subject to some reduction if Applicants remove the condensate. The contract limits the reduction in volume for such purposes to 10%. The estimated reduction is much less than that thus allowed. Of the total proven reserve of 1,673,929,000 Mcf some 430,000,000 Mcf is untested by conventional production methods and rests on the correlation of electric well log and core analysis data.

In nearly all instances the witness made his own structural maps. He made his own determinations of average sand thickness, productive limits, porosity, and connote water, having available for these purposes his own experience and interpretative information contained in Tennessee's own files pertaining to similar fields along the Louisiana Gulf Coast area. He derived reservoir temperature and pressures from well informa-
[755] tion and gradient curves, allowed for deviation from compressibility, and assigned recovery factors. His reserve estimates, though made independently in the manner stated, agree substantially with those of the operator. None of the gas is associated with oil and it is relatively low in condensate.

Basing his testimony on well information and the number of wells drilled and to be drilled, Tennessee's reserve witness testified in conclusion that in his opinion the volumes of gas specified by terms of the contract can be delivered to Tennessee, i.e. 175,000 Mcf per day (15.02 psia) the first year and thereafter in accordance with the reserve ratio.[13]

Tennessee's vice-president in charge of gas purchases testified that these reserves which would amount to a substantial portion of Tennessee's total reserves, not only constituted the only large package of gas for sale in the Gulf Coast area at the time of negotiations, but were well

[13] At the contract take or pay ratio effective after the first year (1,000 Mcf per day for each 8,000,000 Mcf of original recoverable reserves) the average minimum rate of take would become 1/8,000 of 1,673,929,000 Mcf or 209,000 Mcf (14.73 psia) per day. The contracts also provide a formula for the maximum demand which Tennessee can make upon Applicants, providing, on certain assumptions, a swing between the foregoing minimum of 209,000 Mcf and a maximum of 250,000 Mcf per day (14.73 psia).

located with respect to Tennessee's system, and had a significant potential for additional reserves as the acreage is developed, in all advantages of so substantial a character as to have led most of the other interstate gas transmission companies to enter highly competitive bids for them. None of the interveners made any substantial contention that the acquisition of these reserves by Tennessee were improvident or useless or were other than favorable to the interest of the public served by Tennessee's system. In fact the only real objection by interveners to the granting of a certificate to these Applicants is to the price at which these reserves were acquired by Tennessee.

[756] *Prices*

As previously stated herein the contracts set an initial price of 21.4¢ per Mcf (15.025 psia) applicable substantially to the period from the date of initial delivery (November 1, 1957) to November 1, 1962, and provide thereafter for step escalations, briefly at the rate of 2¢ per Mcf every four years until the expiration of the contract. The contracts also provide for reimbursement of State production taxes or a Federal equivalent dependent upon the settlement of title to the offshore shelf lands. The production or severance tax imposed by the existing laws of the State of Louisiana (Act No. 11, Laws 1948; Act No. 45, Laws 1954, amending) is 1¢ per Mcf.

Including the gas which Tennessee proposes to purchase under these contracts, some 240,000 Mcf per day (14.7 psia), it is estimated that the weighted average cost of all gas to Tennessee in 1958 will be some 13.70¢ per Mcf.

as compared with 12.73¢ if the gas here proposed to be purchased is excluded.[14]

Interveners have elicited from their examination of witnesses that, among other things, in the West Delta offshore area, some 200 miles distant, Applicants are selling gas to Tennessee at 17¢ per Mcf; that Tennessee pays only slightly in excess of 10¢ per Mcf, including the gathering tax, in its Southwestern Louisiana pricing area; that Tennessee is not paying as high a price as 21.4¢ to any other producer under any contract; that the step escalation provided in the instant contracts were inserted in part at least, in lieu of favored nations and price redetermination clauses, and are the steepest of any such provisions in Tennessee's present gas purchase contracts. However, initial or other prices paid by other interstate pipelines in long term contracts in onshore areas equal or exceed 20¢ per Mcf for smaller reserves and smaller future potentials than those provided by Applicants' contracts here with Tennessee, and steep step escalations are not unknown in interstate pipeline contracts. All such matters, nevertheless, assume a basis of comparison not provided by the evidence of record in this proceeding. Varying operating conditions, characterizing different transactions could be most significant. Tennessee did not initiate the foregoing price comparisons and no real effort was made by interveners to adequately support them. In any event, to permit such an exploration in this proceeding would simply invite the opening up of the whole subject of the validity of all rates entering into the comparison, viz., not only [757] the

[14] Neither cost figure reflects possible increases which may be filed for under the provisions of Tennessee's other contracts, whether or not these contracts with Applicants become effective.

prices here immediately involved, but the rates charged in the West Delta area,[15] and the others mentioned. This is more than the Act requires or intends in a Section 7 certificate proceeding, such as here, where public convenience and necessity is inherently the basic issue, certainly in the absence of any showing of imprudence or of abuse of discretion by management.

Therefore, assuming management has discretion, within its proper range, to make a selection as to sources of gas supply, and, in the absence of any substantial indication in the evidence or even serious claim by interveners that the initial cost of this gas by itself would necessarily lead to an increase in Tennessee's rates to jurisdictional customers, no grounds appear for permitting this case under Section 7 of the Act to assume the character of a rate proceeding under Section 5 (a) thereof.

Any attempt to add the Mcf cost of lateral line, pipe line, or gathering facilities directly to the price of gas at the offshore platforms for the purpose of arriving at some total Mcf cost of gas to Tennessee's system would simply involve the unwarranted assumption that any other addition of reserves, in lieu of those here involved, would not likewise entail the construction of additional facilities of like nature and of substantial size and proportionate cost. Moreover, the evidence here clearly shows that single or package reserves of such size as Applicants' were not available to Tennessee from other sources in the Gulf Coast area.

Barring questions which cannot be resolved in this proceeding concerning Louisiana's title to the offshore shelf

[15] The West Delta reserves are smaller than those the Applicants offer here

lands and the significance of a determination of title in Louisiana as to the possible seaward extension of parish lines with respect to the territorial scope of price provisions in Tennessee's onshore contracts, the opinion of Tennessee's operating officials is that the West Cameron, East Cameron and Vermilion areas constitute new pricing areas and that the price provisions of the contracts here involved will not trigger existing favored nations or renegotiation clauses in Tennessee's other gas purchase contracts in its Southwest Louisiana pricing area nor, in fact, so affect any of Tennessee's other gas purchase contracts, and no participant made a showing to the contrary.

[758] *The "Substitution" Clause*

Subject to certain conditions not here pertinent, Section 3(j) of the contracts provides a substitution or permissive delivery clause whereby, in substance, each Applicant may deliver up to its 25% share of 50,000 Mcf per day in addition to the respective contract quantities if Applicants are prevented from delivering to Tennessee from their gas reserves dedicated to Tennessee in fields in the West Delta area, such additional deliveries to be made under the terms and prices of these contracts but to be allocable against Applicants' commitments to Tennessee under the West Delta contracts.

This clause was inserted at the suggestion of Tennessee, due to the fact that the gas reserves dedicated to Tennessee under the West Delta contract are so rich in distillate or condensate as to entail possible retrograde condensation in the reservoir during production. Under

such circumstances a possibility exists that either State authorities might require or producers might desire to cycle the gas and recover the liquids, in which circumstances deliveries to Tennessee from that area could or would be curtailed at the time. Operations under Section 3(j), above, would assume make-up deliveries from West Delta at a later time after cycling was completed, and the overall arrangement would operate to enable Tennessee to receive its rightful quantities of gas under any circumstance, and to eventually receive under each contract all contract quantities, probably at the same ultimate resultant cost of purchase. Inequities possibly latent in such an operation cannot now be determined and are not to be considered as if presented for such determination in this proceeding. The clause is not objectionable *per se*.

Applicants' Extraction and Transportation Rights

Section 6(b) of the contracts provide, in brief, that, in addition to mechanical or low temperature separation, Applicants may process the gas for the recovery of liquefiable hydrocarbons including the methane-ethane stream at a shore based extraction plant, provided that such process, together with fuel use, will not remove more than 10% of the volume of gas daily produced and delivered to Tennessee. Moreover, the gas finally delivered to Tennessee must have a total heating value of not less than 1,000 Btu per cubic feet.

Several considerations are pertinent to this matter:

In making deliveries to Tennessee at the off-shore platform Applicants must provide separators to eliminate water in order to meter and deliver dry gas. Separation

also removes at least some of [759] the condensate or distillate which under the contracts may be recombined by Applicants with the gas stream after the gas has been metered for off-shore delivery for transportation by Tennessee to shore and delivery to Applicants without charge. Tennessee's witness testified to the effect that if the Applicants did not remove at least some of the distillate before it was pipelined, Tennessee would have to do so, and further, Tennessee will pay only for the residue gas as remetered at Applicants' onshore processing plant.

The gas is fairly normal Miocene production and is very dry, having a low distillate or condensate content varying from 6 to 11 barrels per 1,000 Mcf, and consequently small shrinkage in volume is expected, i.e., something less than 5% of the stream. Further the flexibility capacity-wise reflected in the design of the lateral line for normal gas operations and the infrequency with which Tennessee would be depleting the reserves here involved, at the maximum rate, make it appear that the real effect cost-wise to Tennessee of the transportation for Applicants, as well as any appropriate disposition with respect thereto, cannot now be determined. This burden will, in any event, have no immediate effect upon Tennessee's rates to jurisdictional customers and can be further considered at such time as operations commence or rate effects become apparent.

[760] The Relation of Tennessee's Application in Docket No. G-11,107

The facts of this proceeding indicate that these reserves are important to Tennessee's expansion and it is known

that the demand for natural gas is almost everywhere in excess of that available from pipeline systems. However, any finding to the effect the public convenience and necessity requires or will require the issuance of certificates to Applicants in this proceeding would be confronted with the fact that a contrary finding made with respect to Tennessee's application for a certificate which is pending in Docket No. G-11,107 would be in fact in conflict as Tennessee proposes to use the reserves which are the subject of this proceeding in connection with its expansion program which is the subject of its application in G-11,107.

The findings and order will therefore be qualified and conditioned upon a certificate being issued to Tennessee in G-11,107 or otherwise, covering facilities necessary to the taking of gas from Applicants into Tennessee's main line system.

FURTHER FINDINGS AND CONCLUSIONS

(1) Applicants, independent producers of natural gas, upon commencement of the sales authorized herein, will be engaged in the sale of natural gas in interstate commerce for resale for ultimate public consumption, subject to the jurisdiction of the Commission, and each will, therefore, be a "natural-gas company" within the meaning of the Natural Gas Act.

(2) The sales of natural gas hereinbefore described, as more fully described in the applications, will be made in interstate commerce, subject to the jurisdiction of the Commission, and such sales by

Presiding Examiner's Decision Upon Applications for Certificate of Public Convenience and Necessity, Filed Pursuant to Section 7 (c) of the Natural Gas Act, Docket Nos. G-11024, et al., Issued March 29, 1957

Applicants, together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(3) Applicants are able and willing properly to do the acts and to perform the services proposed and to conform to the provisions of the Natural Gas Act, and the requirements, rules and regulations of the Commission thereunder.

[761] (4) Assuming the issuance to Tennessee by the Commission of an appropriate certificate for the construction of facilities enabling it to take delivery of Applicants gas into its (Tennessee's) main line system and sales of natural gas by Applicants, together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, are required by the public convenience and necessity, and certificates should be issued as hereinafter ordered and conditioned.

ORDER

Upon consideration of the record herein, the contentions and briefs of counsel, and for the reasons and upon the findings and conclusions set forth in the foregoing portions of this decision, of which this order is a part,

IT IS BY THESE PRESENTS ORDERED, subject to review by the Commission on appeal, or on its own motion, as provided by its Rules of Practice and Procedure, that:

Presiding Examiner's Decision Upon Applications for Certificate of Public Convenience and Necessity, Filed Pursuant to Section 7 (c) of the Natural Gas Act, Docket Nos. G-11024, et al., Issued March 29, 1957

(A) That certificates of public convenience and necessity be and are hereby issued, upon the terms and conditions of this order, authorizing the sales by Applicants of natural gas in interstate commerce for resale, together with the construction and operation of any facilities, subject to the jurisdiction of the Commission, used for the sales of natural gas in interstate commerce, as hereinbefore described and as more fully described in the applications and exhibits in this proceeding.

(B) That certificates issued herein shall be deemed accepted and of full force and effect, unless refused in writing and under oath by Applicants within 30 days from issuance of this order.

(C) That certificates are not transferable and shall be effective only so long as Applicants continue the acts or operations hereby authorized in accordance with the provisions of the Natural Gas Act, and the applicable rules, regulations and orders of the Commission.

[762] (D) That the grant of the certificates herein shall not be construed as a waiver of the requirements of Section 4 of the Natural Gas Act, or of Section 154 of the Commission's Rules and Regulations thereunder requiring the filing of rate schedules for the services herein authorized, and is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or

hereafter instituted by or against the Applicants. Further, the action in this proceeding shall not foreclose nor prejudice any future proceedings or objection relating to the operation of any price or related provision in the gas purchase contracts herein involved.

(E) The question of such transportation and proper charge therefor not being presently before the Commission, the issuance of this order shall not be construed as recognition of any claim by Applicants of an obligation on the part of Tennessee to transport liquids for the account of Applicants.

(F) This certificate is conditioned upon the granting by the Commission of a certificate to Tennessee authorizing the construction and operation of facilities enabling Tennessee to take deliveries of gas from Applicants herein into Tennessee's main line system.

EWING G. SIMPSON
Ewing G. Simpson
Presiding Examiner

Filed: March 29, 1957
Issued: March 29, 1957

Errata Notice, Dated April 1, 1957 Correcting Decision Last Above, Docket Nos. G-11024, *et al.*

• • •

[763] ERRATA NOTICE

(April 1, 1957)

DECISION
UPON APPLICATIONS FOR CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY, FILED PURSUANT TO SECTION 7 (c) OF THE NATURAL GAS ACT

Page 7, Line 9,	Change "the" to "no"
Page 8, Line 16,	Change side heading "The Merits" to center heading
Page 8, Line 29,	Add "," after "others"
Page 10, Fn. 9	Change "the contracts" to "each contract"
Page 12, Line 25	Change "connote" to "connate"
Page 13, Line 10	Change "15.02 psia" to "15.025 psia"
Page 18, Line 11	Delete "in fact"
Page 18, Line 24	Change "jursidiction" to "jurisdiction"
Page 18, Line 29	Change "jursidiction" to "jurisdiction"
Page 19, Line 3	Change "Applicants" to "Applicants'"

EWING G. SIMPSON
Ewing G. Simpson
Presiding Examiner

• • •

Order Denying Motion for Rehearing and Abrogation, Request for Oral Argument, Motion to Consolidate and Fixing Time for Filing Exceptions, Docket Nos. G-11024, *et al.*, Issued March 29, 1957

* * *

[764] Continental Oil Company (Continental), The Atlantic Refining Company (Atlantic), Cities Service Production Company (Cities Service), and Tidewater Oil Company (Tidewater), hereinafter collectively referred to as Applicants, have heretofore filed as independent producers in Docket Nos. G-11024, G-11034, G-11046, and G-11049, respectively, separate applications for certificates of public convenience and necessity, pursuant to Section 7 (c) of the Natural Gas Act, authorizing Applicants to sell natural gas in interstate commerce from common sources located offshore Louisiana to Tennessee Gas Transmission Company (Tennessee) for resale.

Notice of the filing of these applications, together with their consolidation for the purpose of hearing, was issued by the Secretary on October 3, 1956. Pursuant to further notice issued by the Secretary on February 8, 1957, a public hearing was commenced on February 28, 1957, respecting the matters involved in and the issues presented by these applications. At the conclusion of the hearing on March 1, 1957, counsel for Tidewater moved orally on the record in behalf of all of the Applicants that the intermediate decision procedure be waived. This motion was concurred in by all parties of record present and staff counsel. By order issued March 8, 1957, the Commission denied motion for omission of the intermediate decision procedure.

On March 18, 1957, Atlantic and Cities Service jointly filed a request for abrogation and rehearing of the order of the Commission denying said motion for omission of the intermediate decision procedure and, in the alternative, that the Commission fix the time for filing exceptions to

the initial decision in this proceeding at a date not to exceed the date of issuance of such initial decision by 5 days. On March 20, 1957, Tennessee filed an application for reconsideration and oral argument of said order of the Commission. On March 22, 1957, the Public Service Commission of the State of New York (New York Commission) filed an answer to the aforesaid request of Atlantic and Cities Service.

[765] Tennessee and these Applicants argue, in essence, that a certificate of public convenience and necessity, if issued in this proceeding, must be issued no later than April 1, 1957. In support thereof, it is stated that a failure to have the leases involved on production by 1958 would place them in jeopardy because of the obligations contained in the leases, the Outer Continental Shelf Lands Act, and the rules and regulations thereunder; that the only practical way of placing these leases on production is by constructing a marine or underwater pipeline to the wellheads which are located on platforms out in the Gulf of Mexico; that the only feasible time within which to construct such a line is in the spring and early summer (of 1957) in order to avoid the adverse effects of the late summer-early fall hurricane season and wave conditions from a working condition as well as a cost viewpoint; that the gas sales contracts involved provide for the commencement of deliveries on or before November 1, 1957; and that ordinary prudence required Applicants to reserve the right to cancel the gas sale contracts if satisfactory certificates were not issued by April 1, 1957 in order that Applicants might have a margin of time available within which to protect their substantial investments by making

Order Denying Motion for Rehearing and Abrogation, Request for Oral Argument, Motion to Consolidate and Fixing Time for Filing Exceptions, Docket Nos. G-11024, et al., Issued March 29, 1957

alternative arrangements for the disposition of the gas involved. In its answer, the New York Commission urges the denial of the motion to abrogate, objects to the request that only 5 days be allowed within which to file exceptions on the ground that it would result in a virtual deprivation of the right to file exceptions, and denies any inference that has been raised to the effect that it supported the motion for omission of the intermediate decision procedure.

Neither Applicants, Tennessee nor the New York Commission present any arguments or facts not heretofore considered by the Commission in reaching its decision in the aforesaid order denying the motion for omission of the intermediate decision procedure.

On March 1, 1957, the New York Commission, a participating intervener in the instant consolidated proceeding, filed a motion to consolidate said proceeding with the prospective proceeding[1] upon the application of Tennessee in Docket No. G-11107[2] on the ground that the economic feasibility of Applicants' project in the instant proceeding [766] is inextricably bound up with Tennessee's proposals in Docket No. G-11107. Although Tennessee has shown in the instant proceeding the nature and extent of its proposed facilities, as well as the cost thereof, which are directly involved and necessary to take this gas into its existing system, the New York Commission argues in support of its motion that the ruling of the Presiding Ex-

[1] The notice of the filing of Tennessee's application in Docket No. G-11107 was issued on October 11, 1956 and fixed October 31, 1956 as the last day for filing protests or interventions.

[2] As a part of its application in Docket No. G-11107, Tennessee seeks authorization to take the gas involved in the instant proceeding into its existing system through the construction and operation of facilities necessary to pick up said gas at the wellheads located on offshore platforms in the Gulf of Mexico.

aminer that the interveners could not go into the subject of any facilities contained in Tennessee's proposals in Docket No. G-11107 which might be *indirectly* used or proposed to be so used by Tennessee to take the instant gas, makes it impossible for interveners to determine the economic feasibility of the instant and proposed sale of gas by Applicants to Tennessee. The New York Commission also suggests that the Commission has adopted a fixed procedure of consolidating so-called independent producer applications with related pipeline applications, or having separate but concurrent hearings upon such applications, or disposing of pipeline applications prior to those of independent producers.

Answers and objections to the aforesaid motion to consolidate were filed pursuant to Section 1.12 (c) of the Commission's Rules of Practice and Procedure by Atlantic and Cities Service, jointly, on March 20, 1957, by Tennessee on March 22, 1957, and by Tidewater in the form of a telegram on March 26, 1957. These Applicants and Tennessee state, in essence, that the instant proceeding is in its final procedural stage and only requires a determination, and that the New York Commission's motion to consolidate is without merit and is purely dilatory in nature.

The short answer to the contention of the New York Commission is that the Commission has not adopted a fixed procedure concerning the hearing of so-called related applications. In this connection, however, it is the fixed policy of the Commission, within scope of its Rules of Practice and Procedure, to hear and proceed upon so-called

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related applications pending before it in a manner and method which, in the opinion and discretion of the Commission, will best serve the public interest.

The final contention of the New York Commission is also without merit. The ruling of the Presiding Examiner as alleged by the New York Commission is to the effect that the instant hearing is not upon Tennessee's application in Docket No. G-11107 and that there is a reasonable limit which ought not to be exceeded, as to how far the interveners could go in this proceeding into the subject matter of the application filed in Docket No. G-11107. Such a ruling is obviously correct. Furthermore, the New York Commission timely filed a notice of intervention in Docket No. G-11107 on October 16, 1956. By order issued December 11, 1956 in Docket No. G-11107, the remaining interveners in the instant proceeding were permitted to intervene in Docket No. G-11107. Thus, all of the issues raised by Tennessee's application in Docket No. G-11107 will become the matters of hearing in Docket No. G-11107.

[767] *The Commission finds:*

(1) That good and sufficient cause has not been shown for granting the aforesaid motions for rehearing and abrogation, request for oral argument, motion to consolidate and request that the time for filing exceptions to the initial decision be fixed at a date not to exceed the date of issuance of such decision by 5 days, and, therefore, said motions and requests should be denied as hereinafter ordered.

(2) That it is in the public interest and sufficient cause has been shown to fix the time for filing exceptions to the

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initial decision at a date not to exceed the date of issuance of such decision by 10 days, and, therefore, such relief should be granted as hereinafter ordered.

The Commission orders:

(A) That the motions and requests described in Finding (1) hereof be and the same hereby are denied.

(B) That the time for filing exceptions to the initial decision be and the same hereby is fixed at a date not exceeding the date of issuance of decision by 10 days.

By the Commission.

J. H. GUTRIDE,
Joseph H. Gutride,
Secretary.

• • •

Exceptions of Long Island Lighting Company to the Initial Decision of the Presiding Examiner, Docket Nos. G-11024, *et al.*, Filed April 8, 1957

* * *

[791] The Long Island Lighting Company (Long Island) hereby makes and submits the following exceptions to the findings and conclusions of the Presiding Examiner set forth in his initial decision issued March 29, 1957, in the above entitled proceedings, and supports such exceptions as herein set forth:

1. Exception is taken to the finding and conclusions set forth on page 15 of the Examiner's decision as follows:

> "* * * Tennessee did not initiate the foregoing price comparisons and no real effort was made by intervenors to adequately support them. In any event, to permit such an exploration in this proceeding would simply invite the opening up of the whole subject of the validity of all rates entering into the comparison, viz, not only the prices here immediately involved, but the rates charged in the West Delta area (15), and the others mentioned. This is more than the Act requires [792] or intends in a Section 7 certificate proceeding, such as here, where public convenience and necessity is inherently the basic issue, certainly in the absence of any showing of imprudence or of abuse of discretion by management.
>
> "Therefore, assuming management has discretion, within its proper range, to make a selection as to sources of gas supply, and, in the absence of any substantial indication in the evidence or even serious claim by intervenors that the initial cost of gas by itself would necessarily lead to an increase in Tennessee's rates to jurisdictional customers, no grounds appear for permitting this case under

Section 7 of the Act to assume the character of a rate proceeding under Section 5(a) thereof."

Said findings and conclusions of the Examiner are in error as contrary to the facts of record in this proceeding and contrary to the law with respect to the issuance of certificates of public convenience and necessity.

In support of such exception Long Island sets forth the following:

The basic issue in a certificate proceeding is whether the proposed service is in the public interest. If the proposed service or gas sales are not in the public interest, then the certificate sought is not required by the public convenience and necessity irrespective of whether the applicant is able and willing to perform the service and conform to the provisions of the Natural Gas Act and the rules and regulations of the Commission.

The courts have held that the primary purpose of the Natural Gas Act is the protection of consumers. This basic purpose of the Act [793] cannot be fulfilled in producer and pipeline certificate cases, unless the Commission in determining whether the proposed service is in the public interest considers not only the need for the additional gas, but also the effect of the proposed service on the pipeline's rates. If the Commission in passing upon certificate applications only considers the need for additional gas it cannot make a proper lawful determination that the proposed service is in the public interest.

The Examiner is in error in finding and concluding that the effect of the proposed service on Tennessee's rates is not an issue to be considered and determined by the Commission in this certificate proceeding in arriving at

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the fundamental conclusion the Commission must make that the proposed service is in the public interest.

The Examiner is also in error in finding and concluding that there is no claim by the intervenor, Long Island Lighting Company, that the initial cost of this gas by itself would necessarily lead to an increase in Tennessee's rates to jurisdictional customers.

In its initial memorandum (joint memorandum filed on behalf of Long Island and Brooklyn Union), Long Island stated:

> "For the first full year of operation under the application as filed by Tennessee in Docket No. G-11107, the year 1958, the new purchases of gas under the producer contracts would increase the weighted average cost of gas for Tennessee from 12.73 cents per Mcf to 13.70 cents per Mcf or [794] approximately 1 cent per Mcf (Tr. pp. 51-52). In view of the volume of Tennessee's total gas purchases this can scarcely be said to be an immaterial effect on Tennessee's overall cost of gas. • • •"

Long Island's clearly stated interest in these proceedings is the effect of the prices to be paid for this new gas on Tennessee's rates.

The Examiner is also in error in finding and concluding that there is an absence of "any substantial indication in the evidence" that the initial cost of this gas by itself would necessarily lead to an increase in Tennessee's rates to jurisdictional customers.

The evidence in this record, sketchy as it is, does establish that these proposed purchases of new gas do

mean an increase in Tennessee's cost of gas, and that the volumes of this new gas to be purchased by Tennessee will be a substantial part of Tennessee's total gas purchases. The record also discloses that the estimated cost of constructing the additional facilities that Tennessee proposes to build from the producing platforms to connect with its present system at Kinder, Louisiana, is $16,315,000. If the return, related income tax and operating expense for these facilities is considered the initial price of this new gas delivered into Tennessee's system would be further increased. This would be so whether the producers or Tennessee build and operate these facilities.

[795] It cannot be assumed or inferred as the Examiner has done that the additional costs and expenses to Tennessee that is indicated by the evidence in this record will be absorbed by Tennessee and not sought to be recovered by rate increases to its jurisdictional customers.

2. Exception is taken to the following findings and conclusions of the Examiner set forth on page 15 of his decision as follows:

> "Any attempt to add the Mcf cost of lateral line, pipe line, or gathering facilities directly to the price of gas at the offshore platforms for the purpose of arriving at some total Mcf cost of gas to Tennessee's system would simply involve the unwarranted assumption that any other addition of reserves, in lieu of those here involved, would not likewise entail the construction of additional facilities of like nature and of substantial size and proportionate cost."

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In support of this exception Long Island merely states that in *this* producer certificate proceeding the Commission is concerned with the price of *this* new gas to Tennessee as delivered into Tennessee's system through the facilities that will have to be constructed from the producing platforms here involved to Tennessee's system at Kinder, Louisiana. The Commission cannot disregard in this proceeding the additional cost per Mcf of moving this gas from the producing platforms to Tennessee's system, by assuming as the Examiner has done that if these certificates are not granted Tennessee will have to pay an equal price per Mcf for moving other gas that it may purchase in the future from other sources into its system. That price will be subject to investigation and [796] determination by the Commission in future certificate proceedings but not in these present proceedings.

3. Exception is taken to the findings and conclusion of the Examiner as set forth on page 15 of his decision as follows:

> "Barring questions which cannot be resolved in this proceeding concerning Louisiana's title to the offshore shelf lands and the significance of a determination of title in Louisiana as to the possible seaward extension of parish lines with respect to the territorial scope of price provisions in Tennessee's onshore contracts, the opinion of Tennessee's operating officials is that the West Cameron, East Cameron and Vermilion areas constitute new pricing areas and that the price provisions of the contracts here involved will not trigger existing favored nations or renegotiation clauses in Tennessee's other

gas purchase contracts in its Southwest Louisiana pricing area nor, in fact, so affect any of Tennessee's other gas purchase contracts, and no participant made a showing to the contrary."

The Examiner is in error in eliminating as he does the possible triggering effect of the prices to be paid under these new contracts, the question as to Louisiana's title to the offshore shelf lands and the possible seaward extension of the parish lines. The Examiner is also in error in finding and concluding that no participant in these proceedings made a showing contrary to the claim of a Tennessee official that the price provisions in these new contracts would not trigger Tennessee's existing gas purchase contracts in its Southwest Louisiana pricing area.

In support of this exception Long Island states first that the evidence of record discloses that on cross-examination of Mr. Witmer [797] (the only Tennessee operating official who testified in these proceedings) by counsel for Long Island testimony was given that there may be a possible triggering effect on Tennessee's existing Southwest Louisiana contracts.

Mr. Witmer on cross-examination did testify that:

(a) Tennessee does have existing gas purchase contracts in Cameron and Vermilion Parishes (Tr. p. 174).

(b) These existing contracts do contain two-party favored nations and price redetermination clauses (Tr. p. 174).

(c) These clauses in existing contracts do operate in the Southwest Louisiana pricing area of Tennessee, consisting of seven parishes (Tr. p. 174).

Exceptions of Long Island Lighting Company to the Initial Decision of the Presiding Examiner, Docket Nos. G-11024, et al., Filed April 8, 1957

(d) The price presently paid by Tennessee under existing contracts in this pricing area is slightly over 10 cents per Mcf at a 15.025 pressure base (Tr. p. 175).

(e) The land covered by the leases here involved is within the offshore area in dispute between the Federal Government and the State of Louisiana (Tr. pp. 183, 115-116).

(f) Mr. Witmer did not know how far Louisiana was claiming title to the offshore lands, but supposed it was probably to the end of the Continental Shelf (Tr. p. 187).

[798] (g) Mr. Witmer did not know whether the Parish boundaries were co-extensive with the State boundary (Tr. p. 180).

(h) If as a result of the determination or settlement of the dispute between the Federal Government and the State of Louisiana the boundary line of the State was determined so that the leases fell within the State of Louisiana, the lease area might possibly be within the area covered by the favored nations clauses of Tennessee's existing contracts in Cameron and Vermilion Parishes (Tr. p. 181).

In further support of this exception reference is made to Long Island's joint initial memorandum, pages 21-27 and pages 1-6 of Long Island's joint reply memorandum.

4. Reference is made to the findings and conclusion of the Examiner at page 14 of his decision set forth as follows:

> "Intervenors have elicited from their examination of witnesses that, among other things, in the West Delta off-shore area, some 200 miles distant, Appli-

cants are selling gas to Tennessee at 17¢ per M.c.f., that Tennessee pays only slightly in excess of 10¢ per M.c.f., including the gathering tax, in its Southwest Louisiana pricing area; that Tennessee is not paying as high a price as 21.4¢ to any other producer under any contract; that the step escalation provided in the instant contracts were inserted in part at least, in lieu of favored nations and price redetermination clauses, and are the steepest of any such provisions in Tennessee's present gas purchase contracts." (Underscoring added.)

The Examiner is in error by omitting from the above findings and conclusions and from his entire decision any reference whatsoever to [799] a letter agreement dated August 17, 1956 (appearing in the transcript at pages 107-109), between Tennessee and each of the Applicants that was first disclosed at the hearing at the time of cross-examination of Staff Counsel. This heretofore undisclosed letter agreement provides that favored nations clauses and price redetermination clauses are to be written into the original contracts filed with the applications in this proceeding if either the Commission accepts and allows a producer rate resulting from the operation of such clauses in a similar contract or if by judicial decision or statute it is determined that the Commission has no jurisdiction over a producer's price charged to a gas transmission company such as Tennessee.

In other words, although the steep step escalations in these producer contracts in part were arrived at upon the consideration that the original contracts contained no favored nations or price redetermination clauses, a side

agreement provides for writing just such clauses into the original contract under certain conditions.

In further support of this exception reference is made to pages 12-15 of Long Island's initial joint memorandum and to pages 6-8 of Long Island's joint reply memorandum.

5. Exception is taken to the Examiner's Finding and Conclusion (4) appearing on page 19 of his decision and to the Examiner's order paragraph (A) also set forth on page 19 of his decision.

[800] Exception is taken to such findings conclusions and order paragraph for the reason that the Examiner is in error in finding and concluding that on the record in this proceeding as it stands at present, it can be properly and lawfully found and determined that the producer certificates sought herein are in the public interest and required by the public convenience and necessity. Further that the Examiner is in error in concluding as a matter of law that certificates of public convenience and necessity may be issued in these proceedings without any consideration being given to the effect of the prices to be paid under these contracts on Tennessee's rates and charges or the possible triggering effect of these new contract prices on Tennessee's existing contracts. Further, that the Examiner is in error in concluding and ordering that under the law and the evidence of record in this proceeding certificates of public convenience and necessity may issue to the Applicants in this proceeding.

In support of this exception Long Island sets forth the following:

The Commission in the Cities Service-Signal Oil and Gas Company proceeding (Docket No. G-2569—G-2570)

determined that the applicant-seller had the burden in a certificate case of proving all elements of its application so that the Commission may conclude that the service proposed is or may be required by the present and future public convenience and necessity. A vital element of such proof is concerned with the rates proposed. At page 19 of its opinion No. 288 the Commission stated:

> [801] "In this, a proceeding upon a certificate application, Signal as applicant-seller has the burden of proving all elements of its application so that we may conclude that the service proposed is or will be required by the present or future public convenience and necessity. A vital element of such proof is concerned with the rates proposed."

The rationale of the Commission's decision in this Signal case is that the effect of the prices proposed to be paid under the new contracts on the pipeline's rates must be shown and proved. The basic decision of the Commission is not confined solely to the effect on pipeline companies' rates resulting from the triggering effect of one small new contract on existing favored nations contracts. The effect on a pipeline's rates can be as great or greater as a result of single big contract for large quantities of gas at a price substantially in excess of any existing price of the pipeline. The vital element of the effect of the prices to be paid under the new producer contracts on the pipeline's rates must be shown in both situations.

In the present proceeding the effect of these proposed purchases of large quantities of new gas at admittedly the highest price paid by Tennessee in the whole southwest area of the country and substantially above the aver-

age price Tennessee is currently paying for all its gas, cannot be determined from the testimony of record. What evidence there is in the record does indicate that the prices paid under these new contracts, even absent any possible triggering of any existing contracts, will have a material effect on Tennessee's overall cost of gas.

[802] In addition the record does indicate that possible triggering may exist depending upon where the boundary of Louisiana is finally determined and whether the boundaries of Cameron and Vermilion parishes are co-extensive with the State boundary.

Where a new higher price plateau is presented for Commission approval and consideration, the Commission should at least require complete and adequate proof of the effect of these new contract prices on Tennessee's rates. Unless such evidence is presented in the proceeding the Commission cannot under the rationale of its Signal Oil decision determine the proposed sales by the Applicants in this proceeding are in the public interest.

In further support of all the exceptions previously set forth, reference is made to Long Island's initial joint memorandum and reply memorandum.

PROPOSED FINDINGS AND CONCLUSIONS

In lieu of the findings, conclusions and orders made by the Examiner, Long Island respectfully proposes the following Findings and Conclusions:

1. The Applicants in this proceeding have failed to present such evidence as will enable the Commission to determine the effect of the proposed sales of natural gas under Applicants' contracts with Tennessee on Tennessee's rates and cost of gas.

Exceptions of Long Island Lighting Company to the Initial Decision of the Presiding Examiner, Docket Nos. G-11024, et al., Filed April 8, 1957

[803] 2. The Applicants in this proceeding have failed to present such evidence as will enable the Commission to determine whether the price to be paid for the gas proposed to be sold to Tennessee under the Applicants' contracts with Tennessee submitted in support of the respective applications in this proceeding, will cause or result in an increase in the price to be paid by Tennessee under the provisions of its existing gas purchase contracts in Tennessee's Southwest Louisiana pricing area.

3. In the absence of such proof by the Applicants as is referred to in paragraphs 1 and 2 above the Commission is unable to find and determine that the Applicants' proposed sales of natural gas to Tennessee at the prices and under the conditions set forth in the respective contracts of the Applicants with Tennessee are in the public interest and required by the public convenience and necessity.

4. The proceedings are hereby reopened to permit the respective Applicants to present further proof as is referred to in paragraphs 1 and 2 above, and for such purpose a public hearing will be held in these reopened proceedings at a date and time to be fixed by the Commission.

If the Commission does not adopt such findings and conclusions submitted by Long Island, but instead grants the certificates of public convenience and necessity herein sought by the respective Applicants, Long Island in the alternative respectfully proposes that the Commission's [804] order granting such certificates contain the following conditions in addition to those proposed by the Examiner.

Exceptions of Long Island Lighting Company to the Initial Decision of the Presiding Examiner, Docket Nos. G-11024, et al., Filed April 8, 1957

1. That the Applicants' respective contracts with Tennessee as originally submitted with the respective applications to the Commission in these proceedings (Items A, B, C and D) shall not be amended or revised to include any favored nations, price redetermination or similar price escalation clauses.

2. That the contract prices under which the sales of gas involved in these proceedings by the Atlantic Refining Company and Tidewater Associated Oil Company to Tennessee shall be the subject of investigation by the Commission in the Section 5(a) proceedings instituted by the Commission's order of January, 1956, in Docket Nos. G-9283 and G-9284.

3. That the contract prices under which the sales of gas involved in these proceedings by Continental Oil Company to Tennessee shall be the subject of investigation by the Commission in the Section 5(a) proceedings instituted by the Commission in Docket No. G-9279.

With respect to the prices to be paid by Tennessee to Cities Service Production Company, if the Commission has not already instituted a Section 5(a) proceeding with respect to Cities Service Production Company rates, Long Island respectfully requests that the Commission promptly institute a 5(a) proceeding to investigate the justness and [805] reasonableness of the price to be paid by Tennessee

to Cities Service under the contract filed with the application in Docket G-11046.

Dated: April 5, 1957.

Respectfully submitted,

CULLEN AND DYKMAN
Attorneys for Long Island Lighting Company
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Edwin F. Russell
Robert B. Lisle
Of Counsel

• • •

Conditional Exception of the Atlantic Refining Company and Cities Service Production Company, Docket Nos. G-11024, *et al.*, Filed April 8, 1957

* * *

[808] Come now The Atlantic Refining Company (Atlantic) and Cities Service Production Company (Cities Service) and tender the following conditional exception to the Decision of the Presiding Examiner, issued herein on March 29, 1957, all in accordance with § 1.31 of the Commission's Rules of Practice and Procedure (18 CFR 1.31):

I

Atlantic and Cities Service refer to the discussion of the relationship between the applications of the four independent producers, here involved, and the certificate application of Tennessee Gas Transmission Company (Tennessee) at Docket No. G-11107, appearing in the Decision of the Presiding Examiner (mimeo. ed. 18). Reference is also made to the following Ordering Paragraph (F) of the order appended to such Decision (mimeo. ed. 20):

> "(F) This certificate is conditioned upon the granting by the Commission of a certificate to Tennessee authorizing the construction and [809] operation of facilities enabling Tennessee to take deliveries of gas from Applicants herein into Tennessee's main line system."

It obviously is physically impossible for the independent producers to effect deliveries to Tennessee, in the manner here proposed, until facilities have been constructed to connect the producing wells with Tennesseee's existing system. Tennessee cannot build such facilities without authorization therefor.

Tennessee seeks such certificate authority at Docket No. G-11107. Also, it applied for a temporary certificate on March 1, 1957. We interpret the foregoing Ordering Paragraph (F) as being concerned solely with assuring that the

independent producer Applicants, here involved, can meet that part of the statutory test in § 7(e) of the Natural Gas Act which requires that an applicant demonstrate that it is "able" and willing properly to do the acts and to perform the service proposed in its application. Prompt issuance to Tennessee of a temporary certificate at Docket No. G-11107 would authorize Tennessee to construct and operate the facilities necessary to enable Tennessee to take deliveries from Applicants herein. Under our view, therefore, the foregoing Ordering Paragraph (F), and the purpose underlying the same, would thus be fully satisfied.

If more than this is contemplated by such Ordering Paragraph (F), contrary to our view, we address an exception to the same. On March 29, 1957, the same day as that on which the Decision of the Presiding Examiner was issued, the Commission issued its "Order Consolidating Proceedings and Fixing Date of Hearing," in *Re American Louisiana Pipe Line Company, et al.*, Docket Nos. G-2306, *et al.* Among [810] the large number of dockets thus consolidated was *Re Tennessee Gas Transmission Company*, Docket No. G-11107. This order is extraordinary in its length and complexity. It may reasonably be anticipated that a long period of time will elapse before the Commission finally disposes of the applications involved in these consolidated proceedings. Obviously, satisfaction of the foregoing Ordering Paragraph (F) cannot be accomplished in a timely manner, if it is to be postponed until final disposition of the entire application at Docket No. G-11107, which comprehends far more than merely the facilities necessary to enable Tennessee to take deliveries of gas from Applicants herein. To postpone until such time the validation of the certificates issued to the independent producer Applicants, or to hold that they may be

jeopardized by action then taken, would threaten the entire offshore project, with which we are here concerned. If, contrary to our view, this possible result is anticipated by Ordering Paragraph (F), we hereby except to the same, and urge that it be stricken in its entirety.

Respectfully submitted,

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Attorneys for
CITIES SERVICE PRODUCTION COMPANY
By /s/ Bernard A. Foster, Jr.
Bernard A. Foster, Jr.

Dated at Washington, D. C.,
this 5th day of April, 1957.

• • •

Exceptions of New York Public Service Commission to Decision of Presiding Examiner, Docket Nos. G-11024, *et al.*, Filed April 8, 1957

* * * *

[815] The Public Service Commission of the State of New York, an intervenor in the above-entitled proceedings, hereby takes exception to the Decision issued by the Presiding Examiner herein on March 29, 1957.

I

THE SALES ARE NOT IN THE PUBLIC INTEREST

We specifically take exception to Finding (4) on page 19 of the Decision—that the sales of natural gas by Applicants "are required by the public convenience and necessity"—which finding is predicated in large measure upon the discussion of price on pages 14 to 15 of the Decision and, insofar as that discussion includes any findings of fact in support of Finding (4), we specifically except to them as well.

[816] This entire Exception raises the issue as to what extent a proposed initial price is to be considered in an independent producer certificate case. In its *Signal Oil decision*, Opinion #288 issued November 28, 1955, the Commission held that it could and would, in appropriate cases, condition the issuance of a certificate upon the filing by the producer of a price lower than that called for in the initial contract. The *Signal Oil* decision was affirmed by the Court of Appeals for the Third Circuit, 238 F. 2d. 771 and only this week, the Supreme Court denied certiorari.

In the instant case, the price involved would be *the highest price ever paid for natural gas in the entire Southwest.* The gas is to be sold under contracts which contain *the steepest step escalation provisions ever written into a gas purchase contract.* Notwithstanding, in this

proceeding, the Examiner *excluded* evidence "which would enable the Commission to determine the justness and reasonableness of the proposed rates" (Staff Brief 15-16). Although the preparation of a field price study is being carried on jointly by the producers and the Commission Staff and is, according to Commission order issued in another case, to be ready within the next few weeks, the Examiner refused to permit the record to remain open to receive such data. If the Commission is to insist in a case like the instant one that it should not apply its *Signal* doctrine and condition an initial price unless there is in the record evidence of the precise going price, then it is clear that the Examiner committed prejudicial error in these rulings. On the other hand, since it is a matter of common knowledge that the price here [817] proposed *is* the highest price ever proposed to be paid for gas in the Southwest, we submit that the Commission can and should on the basis of the record as it *now* stands, condition the certificates upon the filing of a lower price.

The Examiner's observations on page 14—that "initial or other prices paid by other interstate pipelines in long term contracts in onshore areas equal or exceed 20¢ per Mfc" and that "steep step escalations are not unknown in interstate pipeline contracts"—are both only unsupported, gratuitous rationale. There is no evidence in this record of any contract between an interstate pipeline company and a producer calling for an initial price of over 20¢ for which a certificate has been granted. And as for step escalations, the only pertinent evidence is the testimony of a witness (Witmer) that he knew of no contract calling for step escalations of as much as 5 mills per annum,

(Tr. p. 254). In that light, what we have here is not step escalations, it's rocket-powered projection!

As for the finding in the second paragraph of page 14—"it is estimated that the weighted average cost of all gas to Tennessee in 1958 will be some 13.70¢ per Mcf as compared with 12.73¢ if the gas here proposed to be purchased is excluded"—it is pointed out that the estimator referred to (the witness Witmer) was unable to produce the figures from which the 12.73¢ and 13.70¢ had been derived; he refused to make his working papers available; and, although requested to do so, the Examiner declined to direct him to [818] produce them. Of course, we think that a 1¢ per Mcf increase in the average cost of all gas to Tennessee (whether wrought by this single purchase or otherwise) represents an enormous amount of money. It will total in excess of $7,000,000 annually. As representatives of those who will ultimately pay it, we take marked exception to the Examiner's relegation of that effect of this sale to the limbo of *de minimus*.

Finally, under this point, the Examiner states that the interveners made no effort adequately to support the validity of the comparison between the sale price herein and other sale prices in the Southwest; that they failed to prove that the initial price of the gas here involved would lead to an increase in Tennessee's rates; and that they failed to prove that these contracts would trigger favored nation clauses in Tennessee's existing contracts.

These statements, at page 14 and 15, simply demonstrate complete misconception of the burden of proof. The burden of sustaining the propriety of these sales rests upon the applicants—not the interveners.

Exceptions of New York Public Service Commission to Decision of Presiding Examiner, Docket Nos. G-11024, et al., Filed April 8, 1957

Approval of the sales herein would not merely increase the gas purchase price in a particular pricing area, as was the situation in the *Signal* case, but would also establish as the minimum for a new area—with concomitant pressures on prices in other areas—a price unprecedented in the entire course of natural gas regulation to date. To allow such a price to become effective without requiring more justification therefor than [819] this record contains is but to abandon—not protect—the consumer, for whom, we still insist, the Natural Gas Act was designed.

II

THE EVIDENCE DOES NOT SUPPORT THE FINDING OF WILLINGNESS AND ABILITY TO PERFORM.

Exception is taken to that portion of Finding (3) at page 18, and the discussion at page 8, paragraph 4, of the Examiner's Decision, to the effect that applicants are ready, willing and able to carry out their contracts.

The only evidence relied on to support the finding of willingness and ability to perform is the testimony of the witness McKinley. That witness, according to his own testimony, was *not* responsible for negotiating the contracts, is *not* familiar in any detail with their terms, and is *not* responsible for carrying their provisions into effect. His understanding of the term willingness and ability to perform is that it means the possession of large quantities of money. (Tr. 94-96)

In the face of the foregoing, the Examiner's Decision accepts as fact the witness' conclusion as to willingness

and ability to perform, (admittedly arrived at on the basis of advice from other unnamed persons) on the theory that the witness' duties [820] and responsibilities with Continental add probative value to his conclusion. The record in no way indicates that this witness' duties and responsibilities are such as to provide him with knowledge of the ability of any of the applicants to perform their obligations under the contracts.

III

THE NEED FOR URGENT DISPOSITION OF THESE APPLICATIONS HAS NOT BEEN SUBSTANTIATED.

Specifically under this point we except to the findings (a) at page 9, paragraph 2, of the Decision that "It satisfactorily appears, that in order to comply with the obligation of the leases and the Shelflands Act, production from the leases should commence by 1958", and (b) at page 11, paragraph 2, that otherwise Applicants' titles to their leases would be placed in jeopardy.

Assertions to this effect, together with reference to provisions in the contracts here involved, giving Applicants options to cancel in the event that "satisfactory" certificates of public convenience and necessity were not issued on or before April 1, 1957, have been advanced in explanation for the precipitous course of these proceedings since the initial hearing on February 28, 1957. The April 1 cancellation date came and went without incident. And, insofar as this record discloses, the arrival of [821] 1958 will similarly be uneventful as respects Applicants' titles. The Outer Continental Shelf Lands

Act (43 U.S.C.A., § 1335, sub. 10) contemplates termination of the leases ". . . in the absence of production *or* operations for drilling . . ." by 1958. The record here demonstrates "operations for drilling" involving in excess of 22 wells.

There is no basis whatever in this record upon which the above-specified findings may be supported. And, with or without such support, they do not justify the extreme haste with which these applications have thus far been disposed of, or the extreme consequences thereof as depicted in our Brief filed in this proceeding on March 14, 1957.

Conclusion

If the price of natural gas in Louisiana is to be increased, such an increase should come only in *rate* cases and upon demonstration that the increased price is just and reasonable. To permit price increases through the back door of a Section 7 proceeding, in the measure here demonstrated, simply leaves the consumer—who pays in any event—defenseless. The Section 4 and Section 5 procedures at least afford him the solace that the agency established for his protection has determined the price exaction to be just and reasonable.

[822] The Commission should either reverse the decision of the Presiding Examiner and deny the applications or in the alternative should issue the certificates here sought, further conditioned as follows:

1. A requirement that the applicants renegotiate their contracts with Tennessee to provide for an initial price not to exceed 15.4¢ per Mcf (exclusive of tax reimbursement); and

Exceptions of New York Public Service Commission to Decision of Presiding Examiner, Docket Nos. G-11024, et al., Filed April 8, 1957

2. A requirement that the applicants renegotiate their contracts with Tennessee to provide for a step escalation not to exceed two mills per year.

We heartily concur in the only condition recommended by the Examiner—the grant of a certificate to Tennessee in G-11,107.

We respectfully request an opportunity for oral argument before the full Commission in support of the exceptions set forth herein and in support of the arguments set forth in our initial and reply briefs.

Respectfully submitted,

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK

By /s/ KENT H. BROWN
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LAWRENCE M. DEVORE
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Of Counsel

Exception of Continental Oil Company and Tidewater Oil Company to Presiding Examiner's Decision, Docket Nos. G-11024, *et al.*, Filed April 9, 1957

* * *

[823] On March 29, 1957, the Honorable Ewing G. Simpson, Presiding Examiner in the above entitled and numbered dockets, issued the initial decision. The Commission by order issued on March 29, 1957, fixed the date for filing exceptions to the initial decision at a date not to exceed ten days after March 29, 1957.

The proposed order contains the following condition:

> "(F) This certificate is conditioned upon the granting by the Commission of a certificate to Tennessee authorizing the construction and operation of facilities enabling Tennessee to take deliveries of gas from Applicants herein into Tennessee's main line system."

As is set forth in the initial decision and as is further evidenced by the record and by the briefs [824] filed herein, it is essential that pipe line facilities be constructed during the spring and summer of 1957 to the Applicants' leases in the Cameron, West Cameron and Vermilion areas or the Applicants will face the loss of their leases. Tennessee Gas Transmission Company ("Tennessee"), the purchaser under the subject contracts, has heretofore filed its application in Docket No. G-11107 for authority to construct the necessary facilities to receive the gas from the Applicants in this docket. On March 1, 1957, Tennessee filed an application in Docket No. G-11107 for a temporary certificate to construct and operate said facilities.

In its "Order Consolidating Proceedings and Fixing Date of Hearing" issued on March 29, 1957, the Commission consolidated Docket No. G-11107 with some nineteen separate dockets involving, inter alia, competitive

Exception of Continental Oil Company and Tidewater Oil Company to Presiding Examiner's Decision, Docket Nos. G-11024, et al., Filed April 9, 1957

and mutually exclusive applications for service to the Chicago and other Midwestern areas. It is apparent from the aforesaid order of consolidation that the consolidated docket is one of great complexity [825] and that it is unreasonable to suppose that a final decision could be rendered in Docket No. G-11107 within any reasonable time as affects the situation of the Applicants herein.

Referring to Paragraph (F) of the proposed order contained in the initial decision, the Applicants feel that said condition is intended to be and will be satisfied by the granting of a temporary certificate or other temporary authorization authorizing the construction and operation of facilities enabling Tennessee to take deliveries of gas from Applicants in this docket into Tennessee's main line system. If such is not the case, then the certificate which has been issued to the Applicants is of no value to Applicants and cannot be accepted by them. Applicants will have in fact received no certificate which will enable them to commence deliveries of gas within such period of time as will prevent the loss of their leases. The effect would be to grant the motion of the New York Commission to consolidate the captioned dockets with Docket No. G-11107. This motion [826] was expressly denied by the order of the Commission dated March 29, 1957, in these captioned dockets. Thus, the recommended certificate would be in contradiction with the Commission's order.

If the granting of a temporary certificate or other authorization by the Commission to Tennessee, authorizing it to construct and operate the facilities necessary to take deliveries of gas from the Applicants in this docket,

Exception of Continental Oil Company and Tidewater Oil Company to Presiding Examiner's Decision, Docket Nos. G-11024, et al., Filed April 9, 1957

does not satisfy the conditions as set forth in said Paragraph (F), then the Applicants, in conformity with Section 1.31 of the Rules of Practice and Procedure, except to said condition contained in Paragraph (F) of the proposed order and ask that it be eliminated from the order. If such condition is not eliminated from the order or is not fully satisfied by the issuance of a temporary certificate or authorization to Tennessee as aforesaid, then the entire project will have been thwarted.

In view of the exigencies of the situation, it is respectfully requested that the Commission take [827] immediate action in the premises so that the construction of the pipe line facilities can be commenced instanter.

Respectfully submitted,

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By s/ GENE M. WOODFIN
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Attorney for CONTINENTAL OIL COMPANY

Dated: April 6, 1957

• • •

Exceptions of Public Service Electric and Gas Company to the Initial Decision of the Presiding Examiner, Docket Nos. G-11024, *et al.*, Filed April 9, 1957

* * *

[831] Public Service Electric and Gas Company (Public Service) hereby files its Exceptions to the findings and conclusions of the Presiding Examiner issued March 29, 1957, in the above-entitled proceedings, as follows:

1. The Examiner's decision (Page 15) is erroneous in that he did not apply the law set forth in the Cities Service-Signal Oil and Gas Company cases (Docket Nos. G-2569 and G-2570), and refused to consider the subject of the validity of the prices immediately involved.

2. The Examiner erred in finding that the contracts were entered into as a result of arms-length [832] bargaining, and he failed to consider the possible anti-trust violations involved.

3. The Examiner erred in finding that the evidence indicated that the Applicants are able and willing to do the acts and to perform the service proposed, and to conform to the provisions of the Act and the requirements, rules and regulations of the Commission.

4. The Examiner erred in that he found as a fact that the present and future public convenience and necessity required the issuance of certificates of convenience and necessity.

5. The Examiner erred in that he did not attach to the issuance of the certificate a rate condition which would require that the proposed sales be made at such lower price which would protect the interest of the consumers.

6. The Examiner erred in that he found that the effect of the proposed service on Tennessee's rates is not an

Exceptions of Public Service Electric and Gas Company to the Initial Decision of the Presiding Examiner, Docket Nos. G-11024, et al., Filed April 9, 1957

issue to be considered in this certificate proceeding, and in concluding that there was no substantial indication in the evidence that the initial cost of the gas would lead to an increase in Tennessee's rates.

7. The Examiner erred in that he found that Tennessee would have to pay an equal price for moving [833] other gas that it might purchase from other sources into its system in the event that these certificates were not granted.

8. The Examiner erred in disregarding the possible triggering effect of the prices to be paid under these new contracts.

In support of the Exceptions set forth, Public Service relies on its Brief and Reply Brief filed in these consolidated dockets. Public Service requests an opportunity to present oral argument in support of its Initial and Reply Briefs and in support of the Exceptions herein made.

Respectfully submitted,

(Signed) Edward S. Kirby
Edward S. Kirby
Attorney for Public Service
Electric and Gas Company

Dated: Newark, New Jersey
April 8, 1957.

* * *

Application of Continental Oil Company, The Atlantic Refining Company, Cities Service Production Company and Tidewater Oil Company for Rehearing, Docket Nos. G-11024, *et al.*, Filed May 6, 1957

* * *

[853] Come now Continental Oil Company, The Atlantic Refining Company, Cities Service Production Company, and Tidewater Oil Company (Applicants), and jointly tender this, their application for rehearing of the Commission's "Findings and Order Issuing Temporary Certificates of Public Convenience and Necessity," issued in the above-entitled proceedings on April 22, 1957, petitioning the Commission that it modify such order as proposed hereinbelow. As grounds in support of these requests, Applicants show as follows:

I

This application is filed pursuant to the Natural Gas Act, including particularly § 19(a), and to the Commission's Rules of Practice and Procedure, including particularly § 1.34.

II

The exact legal name of each Applicant, together with the names and addresses of persons to whom communications are to be sent concerning this application are:

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Application of Continental Oil Company, The Atlantic Refining Company, Cities Service Production Company and Tidewater Oil Company for Rehearing, Docket Nos. G-11024, et al., Filed May 6, 1957

CITIES SERVICE PRODUCTION COMPANY
Cecil C. Cammack, Esquire
Cities Service Production Company
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TIDEWATER OIL COMPANY
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III

By its order of April 22, 1957, the Commission issued temporary certificates authorizing sales by Applicants to Tennessee Gas Transmission Company (Tennessee), and also a temporary certificate to Tennessee with respect to construction [855] of the offshore facilities which would connect with facilities of Applicants. Paragraph (F) of that order required unconditional acceptance, within 15 days, of the temporary certificates as conditioned by said order. One such condition remanded the proceedings to the Presiding Examiner to determine at some unspecified later date, "at what rate the public convenience and

necessity" require the sales by Applicants to Tennessee, "if" Applicants are "granted permanent certificates."

In pursuance of their manifest and persistent efforts to make the large reserves of natural gas, here involved, available to the interstate market, Applicants have given extended, thoughtful, and deliberate consideration to the aforesaid Commission order of April 22, 1957. As a result, Applicants have concluded that the nature and extent of the economic risk is such as to foreclose their acceptance of the aforesaid temporary certificates.

IV

The Commission in its order stated in part:

> "The examiner has found there is a need for those volumes of gas on the system of Tennessee Gas, and that the applicants are ready and able to deliver them and take them, respectively. These findings we adopt. They argue conclusively that the sale is necessary in the public interest. All that remains for disposition is a determination as to the rate level at which the public convenience and necessity requires them to be made. Compelling reasons prevent us from postponing making these volumes available, however, until such time as the determination has been made."

[856] While the order does not expressly contemplate a hearing to determine "a just and reasonable rate," safety would require that Applicants introduce evidence of the types appropriate in such a hearing. Applicants could not present such evidence within any reasonable period in

Application of Continental Oil Company, The Atlantic Refining Company, Cities Service Production Company and Tidewater Oil Company for Rehearing, Docket Nos. G-11024, et al., Filed May 6, 1957

the future. This fact alone would prevent the concluding of such hearing prior to the date that deliveries must commence under the contracts. The parties cannot afford to commence construction until at least the initial rate is resolved.

V

The Commission stated erroneously, we believe, that the record did not contain sufficient testimony upon which to base a finding that the public convenience and necessity required the sale of the volumes of gas involved in these applications at the prices proposed. The sales contracts involved provide an initial price of 21.4¢ per Mcf, with tax reimbursement of 1¢ per Mcf. Such contracts also provide for a fixed-price escalation of 2¢ every four years.

The initial price here is only 1.4¢ per Mcf higher than the initial price in a number of sales previously certificated by the Commission in Southern Louisiana, a difference more than justified by the fact that the instant sales are made possible by costly offshore operations. Indeed, with the step escalation applicable in such other contracts, the prices there provided for to be effective at the time when Applicants [857] are scheduled to commence deliveries to Tennessee are not significantly different from the initial price provided for here. On the record here, there can be no issue of real substance as to the initial price. In any event, this is the price which the Natural Gas Act contemplates will be fixed by contract in the first instance. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332 (1950).

At the time of the hearing, and in the briefs of the Applicants, it was pointed out that the Commission had

and does have continuing control over the contract prices to be charged. Since the hearings and the filings of briefs herein, there has been introduced in the 85th Congress, the Harris bill, H.R. 6790. Under such proposed legislation, as applied to the facts of this case, it now appears that the Commission might possibly lose continuing supervision over the future prices provided for in the several contracts, as matters now stand. To prevent this, Applicants are willing to acquiesce in steps to insure that the future prices here provided may be tested under either the applicable rate provisions of the present law, or the reasonable market price standard proposed in the Harris bill, if the latter be enacted.

VI

If permanent certificates are issued to Applicants at this time, it is submitted that the Commission will be vested with ample means of protecting the public interest, under existing law, through its powers under §4 and §5 of the [858] Natural Gas Act. Indeed, rate investigations are currently underway with respect to most of the Applicants here involved.

If the Harris bill should be enacted into law, the Commission would be vested with ample means of protecting the public interest. The initial price would be in conformity with other prices in Southern Louisiana heretofore certificated by the Commission, and under Applicant's proposal hereinafter set forth, the future price provisions of the contracts would be tested under the reasonable market price provisions of the Harris bill.

Application of Continental Oil Company, The Atlantic Refining Company, Cities Service Production Company and Tidewater Oil Company for Rehearing, Docket Nos. G-11024, et al., Filed May 6, 1957

VII

To achieve the results suggested above, Applicants request that the Commission modify the aforesaid order of April 22, 1957, so as to issue forthwith a permanent certificate to each applicant, conditioned to require that, within 20 days after the issuance of the order, each Applicant file with the Commission a duly executed amendment to its applicable gas sales contract with Tennessee, containing the following language:

> If and in the event that H.R. 6790 or any substantially identical legislation is enacted into law by the 85th Congress, and becomes effective, then the provisions of Section 10, *Prices,* commencing with the portion thereof reading
>
> "From the date of initial delivery or November 1, 1, 1957, whichever occurs first, until November 1, 1962 .....21.4 Cents per MCF"
>
> to and including that portion thereof reading
>
> "From November 1, 1986 to expiration of this contract .....35.4 Cents per MCF"
>
> is hereby deleted, and the following is substituted in lieu thereof:
>
> [859] "From the date of initial delivery or November 1, 1957, whichever occurs first, and thereafter ..... 21.4 Cents per MCF
>
> Provided that, After November 1, 1962, Seller shall be entitled to receive and Buyer shall pay the rea-

sonable market price, if higher than 21.4 cents per Mcf, for the gas at the points of delivery within the limitations and subject to the terms and conditions as hereinafter set forth. Such reasonable market price shall be that as fixed by the Federal Power Commission under applicable law, after initial determination thereof by Seller as herein provided. If Seller should determine that the reasonable market price for the gas at the points of delivery for any of the 4-year periods hereinafter listed would be in excess of the price then being paid hereunder, Seller may notify Buyer, not less than eight months prior to the commencement of such period, of the price to be paid by Buyer hereunder during such period and until a subsequent determination by Seller in accordance herewith is made effective. Any price so determined and fixed shall be not less than 21.4¢ per Mcf and not more than:

23.4 Cents per MCF	From November 1, 1962 to November 1, 1966
25.4 Cents per MCF	From November 1, 1966 to November 1, 1970
27.4 Cents per MCF	From November 1, 1970 to November 1, 1974
29.4 Cents per MCF	From November 1, 1974 to November 1, 1978;

and, in the event the term of this contract is extended hereunder beyond November 1, 1978, then not more than

31.4 Cents per MCF ..... From November 1, 1978 to November 1, 1982
33.4 Cents per MCF ..... From November 1, 1982 to November 1, 1986
35.4 Cents per MCF ..... From November 1, 1986 to the expiration of this contract."

Except as altered hereinabove, the provisions of Section 10, *Prices*, shall remain unaffected and in full force and effect.

VIII

[860] Tennessee has informed Applicants that it is agreeable to the foregoing proposal and that it will enter into such an amendment with each of the Applicants.

IX

WHEREFORE, for all of the foregoing reasons, Applicants urge that the Commission forthwith amend its order issued herein on April 22, 1957, all in the manner detailed hereinabove.

Respectfully submitted,

CONTINENTAL OIL COMPANY
By /s/ ROLAND B. VOIGHT
Roland B. Voight

Application of Continental Oil Company, The Atlantic Refining Company, Cities Service Production Company and Tidewater Oil Company for Rehearing, Docket Nos. G-11024, et al., Filed May 6, 1957

THE ATLANTIC REFINING COMPANY
By /s/ BERNARD A. FOSTER, JR.
Bernard A. Foster, Jr.

CITIES SERVICE PRODUCTION COMPANY
By /s/ BERNARD A. FOSTER, JR.
Bernard A. Foster, Jr.

TIDEWATER OIL COMPANY
By /s/ GENE M. WOODFIN
Gene M. Woodfin

Dated at Washington, D. C.,
this 4th day of May, 1947.

(Sworn to May 4, 1957)

• • •

Answer of Public Service Electric and Gas Company to the Motion for Modification of the Commission's Order Issued April 22, 1957, Docket Nos. G-11024, *et al.*, Filed May 14, 1957

* * *

[873] Public Service Electric and Gas Company (Public Service), by way of answer to the Motion filed as an Application for Rehearing in the within Dockets, which application has been accepted for filing as a motion, says that:

1. This ingenious application, if granted, would effectively nullify the Commission's Order issued April 22, 1957, and would deny the right of this Intervenor, which has been recognized in the Commission's Order, to have the question of the reasonableness and justness of the proposed prices for the proposed sales to Tennessee Gas Transmission Company determined after a hearing, whereby the rights of [874] consumers to an adequate supply of natural gas at reasonable prices will be protected.

2. The attempt of the Applicants to have the Commission issue an order grounded on proposed legislation now the subject of hearings before a Committee of the Congress is clearly unlawful and would violate the rights of this Intervenor under the Natural Gas Act.

WHEREFORE, Public Service respectfully requests that Commission summarily deny the Motion which is entitled "Application for Rehearing".

Respectfully submitted,

(Signed) EDWARD S. KIRBY
Edward S. Kirby
Attorney for Public Service
Electric and Gas Company
80 Park Place
Newark 1, New Jersey

Dated: Newark, New Jersey
May 13, 1957.

* * *

Answer of New York Public Service Commission to Applicants' Motion Dated May 6, 1957, Docket Nos. G-11024, *et al.*, Filed May 16, 1957

* * *

[876] By application dated May 6, 1957 the applicants have requested rehearing of the Commission's order issued on April 22, 1957 in the above-entitled proceedings. The application has been accepted as a "motion for modification" of the said order.[1]

In essence, the applicants seek rescission or revocation of the April 22, 1957 order which granted the CATCO group and Tennessee temporary certificates and remanded the proceedings for a determination of the rate required by public convenience and necessity, and request the Commission to enter an order, on the basis of a proposed amended contract, granting permanent certificates for the sales at prices specified in the contract as amended.

[877] The amended contract would not reduce by a single mill the proposed initial price, 21.4¢ per Mcf plus 1¢ gathering tax. Its sole effect would be to confer on the Commission jurisdiction over step escalated price increases; jurisdiction which it now possesses anyway, but which might be lost if the Harris bill should be enacted in its present form.[2]

Such a "concession" fails to meet any of the objections set forth in the Commission's Findings and Order of April 22, 1957. The Commission there stated:

> "The record contains insufficient evidence or testimony, however, on which to base a finding that the public convenience and necessity requires the

[1] Letter dated May 9, 1957 from J. H. Gutride, Secretary of Federal Power Commission to Bernard A. Foster, Jr., attorney for The Atlantic Refining Company and Cities Service Production Company.

[2] It is, of course, superfluous to point out that under existing law applicants are giving up nothing. We believe, moreover, that any conjecture as to the content of the law in 1962 is wholly speculative and unfounded.

sale of these volumes of gas at the particular rate level here proposed. • • •

"Those factors make it abundantly evident that, in the public interest, this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest. See Cities Service Gas Co., Signal Oil and Gas Co., 14 F.P.C. , opinion No. 288, Nos. G-2569, G-2570 November 28, 1955, affirmed as *Signal Oil* and Gas Co. v. *F.P.C.*, 238 F. 2d 771 (CA3), certiorari denied, 353 U. S. 923."

It has been perfectly clear throughout these proceedings that whatever objections may have been raised to other provisions of the original contract, the crucial issue is the unprecedented initial price and the absence of adequate evidence [878] in the record to establish its propriety.[3] Under the law such an infirmity is fatal. It demanded, at the very least, a remand. It cannot be cured by a concession (of dubious value) on some other issue.

Naturally, it is always within an applicant's discretion to accept or reject any type of certificate, temporary or permanent. Its threat to reject a certificate unsatisfactory to it cannot influence the Commission's decision on the merits. If it were otherwise, an applicant could frustrate the whole purpose of a Section 7 proceeding by the simple device of threatening to reject any certification which granted less than the contract called for. CATCO's threat herein cannot be used to compensate for the deficiencies in its case.

[3] The inapplicability of Section 4, and the ineffectiveness of Section 5 proceedings to adequately protect the public with respect to initial price has been commented on so often in Commission opinions and in our briefs that we merely reiterate it in passing.

Answer of New York Public Service Commission to Applicants' Motion Dated May 6, 1957, Docket Nos. G-11024, et al., Filed May 16, 1957

The Commission's order of April 22, 1957 was not only a proper exercise of discretion, but correct as a matter of law. We submit that on the record in this case no decision granting the application at the contract price, under either the original or the proposed amended contract, would be proper. Nothing in applicants' motion requires or permits a "modification" of the order as requested. The motion should be denied.

Respectfully submitted,

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK
By /s/ KENT H. BROWN
Kent H. Brown
Counsel
55 Elk Street, Albany 1, N. Y.

BARBARA M. SUCHOW
Of Counsel

• • •

Answer of The Brooklyn Union Gas Company and Long Island Lighting Company to Applicants' Motion to Amend the Commission's Order, Docket Nos. G-11024, *et al.*, Filed May 16, 1957

* * *

[889] The Brooklyn Union Gas Company and Long Island Lighting Company were each served by mail with a document prepared by the applicants entitled "Application for Rehearing" dated May 6, 1957. Under the Commission's Rules of Practice and Procedure answers to applications for rehearings are not accepted by the Commission. However, by letter dated May 9, 1957, the Secretary of the Commission advised the applicants and other parties to this proceeding, including intervenors, Brooklyn Union and Long Island, that the Commission had construed the applicants' application for a rehearing to be a motion to amend the Commission's order.

For their answer to the said motion of the applicants Brooklyn Union and Long Island respectfully submit the following:

I

By its order of April 22, 1957, the Commission issued temporary certificates authorizing sales by the applicants, *and* also a temporary [890] certificate to *Tennessee* for the construction of the offshore facilities which would connect with the platforms of the applicants.

The Commission in paragraph (F) of its order required unconditional acceptance, within 15 days, of the temporary certificates as conditioned by the said order. As one of the conditions the Commission remanded the proceedings back to the Presiding Examiner to determine "what rates the public convenience and necessity requires these sales to be made if permanent certificates are to be granted" to these applicants upon final disposition of their applications.

Answer of The Brooklyn Union Gas Company and Long Island Lighting Company to Applicants' Motion to Amend the Commission's Order, Docket Nos. G-11024, et al., Filed May 16, 1957

In Section III of their application for rehearing (motion to amend the Commission's order) the producer applicants conclude "that the nature and extent of the economic risk is such as to foreclose their acceptance of the aforesaid temporary certificates."

Again in Section IV of their said application, the applicants conclude that "the parties cannot afford to commence construction until at least the initial rate is resolved."

As the record in this proceeding discloses Tennessee is the company that is to construct the offshore facilities from a connection of its existing system at Kinder, Louisiana to the applicants' well platforms in the Gulf. It is Tennessee, not the applicants, that has been granted a temporary certificate for this construction. Tennessee's case in [891] which evidence will presumably be presented for the Commission's consideration in determining whether a permanent certificate should be granted Tennessee for the construction of these facilities, has not even been heard. If the facilities are to be constructed this spring and early summer before the bad weather season, it is apparent that Tennessee will have to commence this construction under the temporary certificate granted it by the Commission before the Commission could possibly have before it the facts on which it could determine whether a permanent certificate should be issued to Tennessee. Indeed Tennessee, as yet, has issued no statement that it would refuse the temporary certificate granted to it for the construction of these necessary offshore facilities.

It therefore appears that the economic risk of commencing construction of these facilities is on Tennessee, not these applicants, and that this risk is no greater than

any pipeline assumes when a temporary certificate is granted by the Commission prior to a hearing in which the Commission will have before it evidence on which a determination of a permanent certificate can be made.

II

In Section V of their said application (motion) the applicants reargue the point that the initial contract price of 22.4¢ per Mcf for gas sold at the platforms is only 1.4¢ per Mcf higher than the initial price in a number of sales previously certificated by the Commission in [892] Southern Louisiana, and that this difference is more than justified by the fact that the applicants' proposed sales are made possible by costly offshore operations.

These arguments were before the Commission when it originally considered the evidence and arguments made in this proceeding. The Commission's order of April 22, 1957 clearly shows that the Commission carefully considered these very arguments in reaching the decision that it did.

III

In Section VI of their application for rehearing (motion to amend the Commission's order) these applicants state that "the Commission will be vested with ample means of protecting the public interest, under existing law, through its powers under sections 4 and 5 of the Natural Gas Act. Indeed, rate investigations are cur-

rently underway with respect to most of the Applicants here involved."

Apparently from this concession the applicants recognize the Commission's power to review and determine in a Section 5(a) proceeding, the justness and reasonableness of the initial rate of 22.4¢ per Mcf proposed to be charged by Tennessee. Just how their economic risk would be improved if a permanent certificate were to be granted now and the Commission should determine in a Section 5(a) proceeding shortly after the proposed sales actually commenced this fall, that the initial contract rate [893] was unjust and unreasonable and should be reduced, is not disclosed. Apparently by demanding permanent certificates now these applicants wish to take advantage of any regulatory lag that might exist, and to have their initial contract price in effect and not subject to refund from the time when the sales to Tennessee actually commence this fall and the date when the Commission made a determination in a 5(a) proceeding with respect to the initial rate. The possible advantages accruing to the applicants from a possible regulatory lag in the Commission's determination of a just and reasonable initial rate do not appear to be a sufficient reason for the Commission to grant permanent certificates with respect to the proposed sales at this time. The course suggested by the Commission in its order seems more fair to all parties, namely, that these applicants present their proof in justification of the contract price to the Examiner in the remanded proceedings to the end that the Commission can determine whether these prices are in the public

interest and then issue permanent certificates conditioned as to the initial price as the Commission may deem proper, before sales are made by these applicants to Tennessee in November 1957.

IV

In Sections V and VI of their said application (motion) these applicants refer to the Harris-O'Hara Bill, HR 6790-6791 which has recently been introduced in the 85th Congress. The applicants state, [894] "Under such proposed legislation, as applied to the facts of this case, it now appears that the Commission might possibly lose continuing supervision over the future prices provided for in the several contracts, as matters now stand. To prevent this, Applicants are willing to acquiesce in steps to insure that the future prices here provided may be tested under either the applicable rate provisions of the present law, or the reasonable market price standard proposed in the Harris bill, if the latter be enacted."

Here again the applicants' concern appears to be with respect to the Commission's review of the initial price, and not the review of future price increases under the applicants' contracts. While the Commission in this proceeding must proceed under the existing law, it is not presumed to be unaware of the effect of the possible enactment of the Harris-O'Hara Bill. Under such circumstances it is apparent that the Commission's action in granting these applicants only temporary certificates at this time is proper and fair to all parties to the proceedings. By such action the Commission has merely reserved

Answer of The Brooklyn Union Gas Company and Long Island Lighting Company to Applicants' Motion to Amend the Commission's Order, Docket Nos. G-11024, et al., Filed May 16, 1957

the right to determine, in the event the Harris-O'Hara Bill is enacted, whether the initial contract price and the future price increases may exceed the reasonable market price standard contained in the proposed Bill now before the Congress.

V

It would seem that what is desired by all the parties to this proceeding is prompt determination by the Commission, after a presenta- [895] tion of proper evidence, that the initial price of 22.4¢ per Mcf at which the proposed sales will be made is in the public interest. This is true whether the Harris-O'Hara Bill is enacted or not. These applicants in their application for rehearing (motion to amend the Commission's order) refer to their manifest and persistent efforts to make the large reserves of natural gas, here involved, available to the interstate market. Brooklyn Union and Long Island have the same desire, and to this end are prepared to cooperate to the end that the price issues referred to by the Commission may be expeditiously presented to and determined by the Commission in the manner suggested by the Commission's order.

For the foregoing reasons Brooklyn Union and Long Island respectfully submit that the application for rehearing (motion to amend the Commission's order) to provide

Answer of The Brooklyn Union Gas Company and Long Island Lighting Company to Applicants' Motion to Amend the Commission's Order, Docket Nos. G-11024, et al., Filed May 16, 1957

for the issuance of permanent certificates at this time should be denied.

Respectfully submitted,

CULLEN AND DYKMAN
Cullen and Dykman
Attorneys for Long Island Lighting Company
177 Montague Street
Brooklyn 1, New York

DAVID K. KADANE, General Counsel
EDWARD M. BARRETT, General Attorney
Long Islang Lighting Company
250 Old Country Road
Mineola, New York

Dated: May 16, 1957

EDWIN F. RUSSELL
EDWIN F. RUSSELL
ROBERT B. LISLE
Of Counsel

• • •

Application of Tennessee Gas Transmission Company for Rehearing and Reconsideration, Docket Nos. G-11024, *et al.*, Filed June 4, 1957

* * *

[910] Tennessee Gas Transmission Company (Tennessee), Intervenor, pursuant to Section 19(a) of the Natural Gas Act and Section 1.34 of the Commission's Rules, files this Application for Rehearing and Reconsideration of the Commission's "Findings and Order Issuing Permanent Certificates of Public Convenience and Necessity and Modifying Previous Order", issued in this proceeding on May 20, 1957. In support hereof, Tennessee respectfully shows as follows:

I

On May 20, 1957, the Commission issued an order granting permanent certificates of public convenience and necessity to the above-named independent producer-applicants authorizing the sale of natural gas to Tennessee from leases in the East Cameron, West Cameron and Vermilion areas off the coast of Louisiana in the Gulf of Mexico, and the construction and operation of any facilities, subject to the jurisdiction of the Commission, used for such sale, as more fully described in the applications in this proceeding. The certificates were issued subject to the condition that the producer-applicants [911] shall within 20 days file with the Commission a duly executed amendment to Section 10 of their contracts with Tennessee embodying the language set out in paragraph (B) of the order. Such condition requires, *inter alia*, that the initial price of the gas in the contracts be reduced from 21.4 cents per Mcf to 17 cents per Mcf (exclusive of the one-cent Louisiana gathering tax). The Commission indicated in its order that if such condition were complied with, and the producer-applicants thereafter filed a proposed rate

Application of Tennessee Gas Transmission Company for Rehearing and Reconsideration, Docket Nos. G-11024, et al., Filed June 4, 1957

increase, the Commission would limit suspension of such initial rate increase filing to a period of 24 hours.

It is clear that the practical effect of the Commission's order would be to convert the present initial contract price of 21.4 cents per Mcf from a non-suspendible *initial* rate under the Natural Gas Act to a suspendible rate *change*. It is equally clear that the agreed contract price is sought to be changed by the Commission, under pain of forfeiture of a certificate, notwithstanding the holding of the Supreme Court in *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U. S. 332, at page 378, that:

> "In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts. In this respect, the Act is in marked contrast to the Interstate Commerce Act, which in effect precludes private rate agreements by its requirement that the rates to all shippers be uniform, a requirement which made unnecessary any provision for filing contracts. • • •"

II

It is not the purpose of this application to reargue the question of the legality of the Commission's order. Tennessee and the applicant-producers are firmly convinced that the Congress never intended that initial [912] rates in a contract involving an initial service should be suspended either directly, or indirectly through the device of

Application of Tennessee Gas Transmission Company for Rehearing and Reconsideration, Docket Nos. G-11024, et al., Filed June 4, 1957

a condition in a certificate. Such arguments having been fully presented in our briefs and pleadings, we shall not repeat them here. Rather, it is our purpose here to inform the Commission of recent developments so that the Commission may, after being fully advised of the consequences of its order of May 20, 1957, reconsider and modify said order so as to avert irreparable injury to Tennessee and the fuel economy of the areas which it serves.

Tennessee has been definitely advised by the producer-applicants that they will not amend Section 10 of the contract so as to change the initial rate from 21.4 cents per Mcf to 17 cents per Mcf. Tennessee has been further informed by the producer-applicants that the certificates issued by said order will not be accepted by them for that reason, and that, accordingly, the contracts will be terminated. It is clear, therefore, that Tennessee now faces the stark reality of contract termination; and its customers face the grim reality of suffering the loss of natural-gas supplies which are required to insure adequate and continuous long-term service and to meet the expanding needs of the consumers. The consequences of the loss of these valuable gas reserves are so far-reaching, and the impact thereof on the economy of the areas involved is so great, as to stagger the imagination. The Commission recognized that the public convenience and necessity requires the attachment by Tennessee of these gas reserves when it stated in its order issued April 22, 1957 in the proceeding:

> "The examiner has found there is a need for those volumes of gas on the system of Tennessee Gas, and that the applicants are ready and able to deliver

them and take them, respectively. These findings we adopt. They argue conclusively that the sale is necessary in the public interest. • • •"

[913] In these circumstances, Tennessee feels that it would be remiss in its duty if it failed to make this final appeal to the Commission in an effort to avert the termination of its contracts, the loss of these valuable gas reserves, and the disastrous consequences which are certain to result therefrom. In so doing, Tennessee does not underestimate or belittle the importance of considerations as to price. But, as we have frequently pointed out, after these gas reserves have been committed to Tennessee's markets, the public will be adequately protected through the normal rate-fixing provisions of Section 5 of the Natural Gas Act, as Congress intended.

The fact of the matter is that the price feature of the contract has been magnified far out of proportion to its real significance. Any doubts concerning this are quickly dispelled by reference to the unrefuted facts of record which establish that:

1. The price provisions in the contract do not affect or trigger any of Tennessee's existing favored nation or renegotiation clauses contained in its other gas purchase contracts or in the contracts of any other company.

2. Unlike the *Signal* case, the area here involved is a *new* area from which no other sales are now being made. Consequently, no increase in an area price is involved here, and no economic disruption will be caused by the contract price.

Application of Tennessee Gas Transmission Company for Rehearing and Reconsideration, Docket Nos. G-11024, et al., Filed June 4, 1957

3. Not a shred of evidence was introduced to prove that the contract rate is unjust or unreasonable.

4. Texas Gas Transmission Company is paying 20 cents per Mcf and Southern Natural Gas Company is paying 20¼ cents per Mcf in areas in which Tennessee now purchases gas. For gas purchased in the southeastern portion of Louisiana, American Louisiana and United Fuel have contracts in which the prices "started out" at 20 cents per Mcf. Olin Gas Transmission Company is also paying 20 cents for gas purchased in that area (Tr. 294-6). Yet, these prices are for smaller reserves and for reserves having less potential than those [914] involved in the instant case (Tr. 295-6). In the *Houston, Texas Gas and Oil* case, the Commission observed (Opinion 301, p. 7) that Florida Power will be paying for Louisiana gas "21.0 cents per Mcf for the first two years after the date of initial delivery and 22.5 cents per Mcf after the first two years. • • •"

In the welter of the discussion concerning rates in this proceeding, sight seems to have been lost of the testimony of Tennessee's witness Witmer to the effect that "• • • *the initial price in this contract, by itself, would not cause Tennessee to file a rate increase*" (Tr. 237). In this regard, it is to be noted that no part of the rate increase involved in Tennessee's pending rate proceedings (Docket Nos. G-5259 and G-11980) reflects any claimed increase in purchased gas expense by reason of the anticipated

purchase of gas under the contract involved in the instant proceeding.

III

As indicated above, Tennessee has been advised that the certificates issued by the Order of May 20, 1957 are not satisfactory to any of the four producer-applicants because of the 17-cent price condition. This is for the reason that this condition places the burden of proof as to the 21.4 cent initial contract price upon the sellers under a Section 4 proceeding, whereas in their opinion this burden should properly be upon the Commission in a Section 5(a) proceeding. They are of the further opinion that it would constitute an undue burden to require them to file a Section 4 application covering one field while at the same time they are presently defending Section 5(a) proceedings which involve their entire interstate sales.

The use of a condition in a certificate to accomplish such a reversal of the procedure contemplated by the Natural Gas Act raises a serious question in the minds of the applicant-producers as to the fairness [915] of the regulation they can anticipate under either the Natural Gas Act as it now stands or under the Harris Bill (H.R. 6790) if enacted.

In its order of May 20, 1957, the Commission found that "the record does not contain sufficient evidence on which to base a finding that the public convenience and necessity requires the sale of the gas at that particular [21.4 cents] rate level." It is clear, however, that the record does not contain a single shred of evidence which supports a rate

level of 17 cents per Mcf. In these circumstances, it seems crystal clear that the initial contract rate as fixed by the parties is the only lawful rate that can be made initially effective pending any investigation under Section 5(a) of the Natural Gas Act.

The Commission further found in its order that:

> "• • •. Furthermore, under the provisions of the so-called Harris Bill, if it is enacted into law, the proposed initial price might no longer be subject to adjustment by us. • • •"

In this regard, the Commission's attention is directed to an important event which transpired since the issuance of that order. On May 22, 1957, the Chairman of the Senate Interstate and Foreign Committee announced that the Senate would not have time to consider the Harris Bill this year. It seems clear, therefore, that the Commission will have ample time within which to resolve the question of the reasonableness of the 21.4-cent contract rate in a Section 5(a) proceeding before the Harris Bill can be enacted into law.

[916] WHEREFORE, Tennessee respectfully and urgently requests that the Commission, upon reconsideration of its Order of May 20, 1957, revise the same to conform to the relief requested by the producer-applicants in their

Application of Tennessee Gas Transmission Company for Rehearing and Reconsideration, Docket Nos. G-11024, et al., Filed June 4, 1957

Motion for Modification[1] of the Commission's Order of April 22, 1957.

Respectfully submitted,

TENNESSEE GAS TRANSMISSION COMPANY
By Harry S. Littman
Its Attorney

William C. Braden, Jr.
Commerce Building
Houston, Texas

Harry S. Littman
Jack Werner
317 Wyatt Building
Washington, D. C.
Attorneys for Tennessee Gas
Transmission Company

(Sworn to June 3, 1957.)

[1] Said Motion was filed herein on May 6, 1957 as an "Application for Rehearing."

• • •

Order Granting Rehearing and Fixing Date for Oral Argument and Specifying Time Allotted for Argument, Docket Nos. G-11024, *et al.*, Issued June 6, 1957

* * *

[920] On April 22, 1957, the Commission issued its findings and order in the above-styled proceedings granting temporary certificates of public convenience and necessity to Continental Oil Company, The Atlantic Refining Company, Cities Service Production Company and Tidewater Oil Company (hereinafter collectively referred to as Catco) and to Tennessee Gas Transmission Company (Tennessee Gas). In such order (Paragraph D, mimeo. p. 5) the Commission, among other things, directed that the proceedings "be remanded to the presiding examiner to determine at what rate the public convenience and necessity requires the sale of natural gas by Catco to Tennessee Gas to be made if these Catco companies are granted permanent certificates of public convenience and necessity."

The contracts between the Catco companies and Tennessee Gas provided for an initial rate of 21.4 cents[1] per Mcf of natural gas and for a definitely fixed price escalation of 2 cents per Mcf every four years.

On May 6, 1957, the Catco companies filed a motion for modification of the Commission's order issued April 22, 1957, which in effect, requested the Commission to approve the initial rate of 21.4 cents per Mcf and to issue a final certificate of public convenience and necessity to each of the Catco companies. In such motion, however, the Catco companies proposed to amend their respective contracts with Tennessee Gas so as to change the four year definite fixed price escalations to indefinite price escalations.

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[1] Reimbursement for the one-cent Louisiana gathering tax would be added to this amount.

Order Granting Rehearing and Fixing Date for Oral Argument and Specifying Time Allotted for Argument, Docket Nos. G-11024, et al., Issued June 6, 1957

[921] Answers to the aforementioned motion were filed by New York Public Service Commission, Lake Shore Pipe Line Company, Brooklyn Union Gas Company and Long Island Lighting Company (jointly), Public Service Electric and Gas Company and Tennessee Gas. The answers filed by the parties, other than that of Tennessee Gas, opposed the granting of the motion.

Subsequently, on May 20, 1957, the Commission issued its findings and order granting certificates of public convenience and necessity to the Catco companies on condition that the contracts between the Catco companies and Tennessee Gas be amended so as to provide for an initial price of 17 cents per Mcf, with provision for filing a request for an increase in such price to 21.4 cents per Mcf. Under the condition provision was also made for the incorporation in such contract of four year indefinite price escalations.

On June 4, 1957, Tennessee Gas filed an application for rehearing and reconsideration of the Commission's order issued on May 20, 1957. In such application, Tennessee Gas represents that the Catco companies are unwilling to accept the certificates of public convenience and necessity granted by the order issued May 20, 1957, under the conditions specified in such order. Tennessee Gas represents further in such application for rehearing that the Catco companies propose to terminate the gas sales contracts.

Tennessee Gas requests the Commission, upon reconsideration of its order issued May 20, 1957, to revise such order to conform to the relief requested by the Catco companies in their Motion for Modification of the Commission's order issued April 22, 1957.

Order Granting Rehearing and Fixing Date for Oral Argument and Specifying Time Allotted for Argument, Docket Nos. G-11024, et al., Issued June 6, 1957

Because of the great public interest involved in these proceedings the Commission *finds*:

(1) It is necessary and desirable in the public interest to grant the application for rehearing and reconsideration filed in these proceedings by Tennessee Gas on June 4, 1957.

(2) It is necessary and desirable to properly carry out the provisions of the Natural Gas Act to hear oral argument in these proceedings upon the contentions made and the issues presented by the application for rehearing, the motion for modification and the answers thereto heretofore filed in these proceedings.

The Commission orders:

(A) Oral argument be held before the Commission on June 12, 1957, at 10:00 a.m. (EDST) in a Hearing Room of the Federal Power Commission, 441 G Street, N. W., Washington, D.C.

[922] (B) Time for oral argument is allotted as follows:

Tennessee Gas Transmission Company	30 minutes
Continental Oil Company	20 minutes
The Atlantic Refining Company	20 minutes
Cities Service Production Company	20 minutes
Tidewater Oil Company	20 minutes
New York Public Service Commission	20 minutes
Lake Shore Pipe Line Co.	20 minutes
Brooklyn Union Gas Company and Long Island Lighting Company	20 minutes
Public Service Electric and Gas Company	20 minutes

Order Granting Rehearing and Fixing Date for Oral Argument and Specifying Time Allotted for Argument, Docket Nos. G-11024, et al., Issued June 6, 1957

Provided, however, that the Catco companies and interveners in these proceedings may agree upon such division of time among them not in excess of the total time (80 minutes) allotted to them.

By the Commission.

J. H. GUTRIDE
Joseph H. Gutride,
Secretary.

• • •

Amendment of Gas Purchase and Sales Agreement between Tennessee Gas Transmission Company and Continental Oil Company

* * *

[944] WHEREAS, by an instrument dated August 17, 1956, Tennessee Gas Transmission Company, a Delaware corporation, as Buyer, and Continental Oil Company, a Delaware corporation, as Seller, entered into a Gas Purchase and Sales Agreement covering gas to be produced from certain leases therein described in the East Cameron, West Cameron and Vermilion areas of the Continental Shelf of the Gulf of Mexico, to which instrument reference is here made for all purposes; and

WHEREAS, both parties desire to amend said Gas Purchase and Sales Agreement as herein provided to comply with the order of the Federal Power Commission issued June 24, 1957, in its Docket No. G-11024 et al;

NOW, THEREFORE, in consideration of the premises and for other good and valuable considerations, the receipt and sufficiency of which are hereby acknowledged, it is agreed that the above-described Gas Purchase and Sales Agreement shall be amended as follows:

If and in the event that H. R. 6790 or any substantially similar legislation is enacted into law by the 85th Congress, and becomes effective, then the provisions of Section 10, *Prices,* commencing with the portion thereof reading

[945] "From the date of initial delivery or November 1, 1957, whichever occurs first, until November 1, 1962 ..... 21.4 Cents per MCF"

to and including that portion thereof reading

"From November 1, 1986 to expiration of this contract ..... 35.4 Cents per MCF"

Amendment of Gas Purchase and Sales Agreement between Tennessee Gas Transmission Company and Continental Oil Company

is hereby deleted, and the following is substituted in lieu thereof:

From the date of initial delivery or November 1, 1957, whichever occurs first, and thereafter .....: 21.4 Cents per MCF

Provided that, after November 1, 1962, Seller shall be entitled to receive and Buyer shall pay the reasonable market price, if higher than 21.4 cents per Mcf, for the gas at the points of delivery within the limitations and subject to the terms and conditions as hereinafter set forth. Such reasonable market price shall be that as fixed by the Federal Power Commission under applicable law, after initial determination thereof by Seller as herein provided. If Seller should determine that the reasonable market price for the gas at the points of delivery for any of the 4-year periods hereinafter listed would be in excess of the price then being paid hereunder, Seller may notify Buyer, not less than eight months prior to the commencement of such period, of the price to be paid by Buyer hereunder during such period and until a subsequent determination by Seller in accordance herewith is made effective. Any price so determined and fixed shall be not less than 21.4¢ per Mcf and not more than:

23.4 Cents per MCF ..... From November 1, 1962 to November 1, 1966

Amendment of Gas Purchase and Sales Agreement between Tennessee Gas Transmission Company and Continental Oil Company

25.4 Cents per MCF ..... From November 1, 1966 to November 1, 1970

27.4 Cents per MCF ..... From November 1, 1970 to November 1, 1974

29.4 Cents per MCF ..... From November 1, 1974 to November 1, 1978;

[946] and, in the event the term of this contract is extended hereunder beyond November 1, 1978, then not more than

31.4 Cents per MCF ..... From November 1, 1978 to November 1, 1982

33.4 Cents per MCF ..... From November 1, 1982 to November 1, 1986

35.4 Cents per MCF ..... From November 1, 1986 to the expiration of this contract.

Except as altered hereinabove, the provisions of Section 10, *Prices*, shall remain unaffected and in full force and effect.

In the event that the above-described Federal Power Commission order of June 24, 1957 does not become final, this Amendment shall be null and void. Except as herein expressly modified, the above-described Gas Purchase and Sales Agreement shall remain in full force and effect in accordance with all of its terms and provisions.

Amendment of Gas Purchase and Sales Agreement between Tennessee Gas Transmission Company and Continental Oil Company

EXECUTED IN DUPLICATE ORIGINALS on the 8th day of July, 1957.

TENNESSEE GAS TRANSMISSION COMPANY

By: /s/ HAROLD BURROW
Senior Vice President
BUYER

ATTEST:

/s/ LAVERNE E. COLLINS
Assistant Secretary
(SEAL)

CONTINENTAL OIL COMPANY

By: /s/ O. L. FISHER
Vice President
SELLER

ATTEST:

/s/ KEITH W. BLINN
Assistant Secretary
(SEAL)

(Acknowledged July 8, 1957.)

• • •

Supplement to The Atlantic Refining Company's Application for a Certificate of Public Convenience and Necessity; Atlantic Refining Company's Acceptance of Certificate of Public Convenience and Necessity and Resolution of Board of Directors

* * *

[948] Comes now The Atlantic Refining Company (Atlantic) and supplements its application filed in the above-entitled proceedings on September 7, 1956, as follows:

There is appended hereto, as Exhibit "C" to the foregoing application, a copy of an "Amendment to Gas Purchase and Sales Agreement, East Cameron, West Cameron, and Vermilion Areas," executed by Atlantic, as seller, and Tennessee Gas Transmission Company, as buyer.

Said agreement is hereby filed with the Commission, in accordance with Paragraph (B) of the Commission's "Order, Upon Application for Rehearing, Adopting Initial Decision of Presiding Examiner with Modifications and

Conditions," issued in the above-entitled proceedings on June 24, 1957.

Respectfully submitted,

THE ATLANTIC REFINING COMPANY

By /s/ BERNARD A. FOSTER, JR.
Bernard A. Foster, Jr.

Dated at Washington, D. C., this 10th day of July, 1957.

(Sworn to July 10, 1957.)

• • •

AMENDMENT TO GAS PURCHASE AND SALES AGREEMENT EAST CAMERON, WEST CAMERON AND VERMILION AREAS

[952] WHEREAS, on August 10, 1956, a certain Gas Purchase and Sales Agreement was entered into by and between Tennessee Gas Transmission Company, a Delaware corporation, and The Atlantic Refining Company, a Pennsylvania corporation, covering the sale of natural gas from the East Cameron, West Cameron and Vermilion Areas off the coast of Louisiana in the Gulf of Mexico, to which instrument reference is hereby made for all purposes; and

WHEREAS, both parties desire to amend said Gas Purchase and Sales Agreement as herein provided to comply with Paragraph (B) of the order of the Federal Power Commission issued June 24, 1957, in its Docket No. 11034;

NOW, THEREFORE, in consideration of the premises, it is hereby agreed that the above described Gas Purchase

and Sales Agreement shall be and the same hereby is amended as follows:

"If and in the event that H. R. 6790 or any substantially similar legislation is enacted into law by the 85th Congress, and becomes effective, then the provisions of Section 10, *Prices*, commencing with the portion thereof reading

'From the date of initial delivery or November 1, 1957, whichever occurs first, until November 1, 1962 ..... 21.4 Cents per MCF

[953] to and including that portion thereof reading

'From November 1, 1986 to expiration of this contract ..... 35.4 Cents per MCF'

is hereby deleted, and the following is substituted in lieu thereof:

From the date of initial delivery or November 1, 1957, whichever occurs first, and thereafter ..... 21.4 Cents per MCF

Provided that, After November 1, 1962, Seller shall be entitled to receive and Buyer shall pay the reasonable market price, if higher than 21.4 cents per Mcf, for the gas at the points of delivery within the limitations and subject to the terms and conditions as hereinafter set forth. Such reasonable market price shall be that as fixed by the Federal Power Commission under applicable law, after initial determination thereof by Seller as herein provided. If Seller should determine that

the reasonable market price for the gas at the points of delivery for any of the 4-year periods hereinafter listed would be in excess of the price then being paid hereunder, Seller may notify Buyer, not less than eight months prior to the commencement of such period, of the price to be paid by Buyer hereunder during such period and until a subsequent determination by Seller in accordance herewith is made effective. Any price so determined and fixed shall be not less than 21.4¢ per Mcf and not more than:

23.4 Cents per MCF	From November 1, 1962 to November 1, 1966
25.4 Cents per MCF	From November 1, 1966 to November 1, 1970
27.4 Cents per MCF	From November 1, 1970 to November 1, 1974
29.4 Cents per MCF	From November 1, 1974 to November 1, 1978;

[954] and, in the event the term of this contract is extended hereunder beyond November 1, 1978, then not more than

31.4 Cents per MCF	From November 1, 1978 to November 1, 1982
33.4 Cents per MCF	From November 1, 1982 to November 1, 1986
35.4 Cents per MCF	From November 1, 1986 to the expiration of this contract.

Supplement to The Atlantic Refining Company's Application for a Certificate of Public Convenience and Necessity; Atlantic Refining Company's Acceptance of Certificate of Public Convenience and Necessity and Resolution of Board of Directors

Except as altered hereinabove, the provisions of Section 10, *Prices,* shall remain unaffected and in full force and effect."

In the event that the above described Federal Power Commission order of June 24, 1957, does not become final and effective, or should be set aside or held invalid, either in whole or in part, this Amendment shall be voidable at the election of either party hereto within a reasonable time thereafter. Except as herein expressly modified, the above described Gas Purchase and Sales Agreement shall remain in full force and effect in accordance with all of its terms and provisions.

EXECUTED IN DUPLICATE ORIGINALS on this the 8th day of July, 1957.

TENNESSEE GAS TRANSMISSION COMPANY
By /s/ HAROLD BURROW
Senior Vice President

ATTEST:
/s/ LAVERNE E. COLLINS
Assistant Secretary

THE ATLANTIC REFINING COMPANY
By /s/ J. N. MENDENHALL
General Manager of Domestic Crude Oil Production

ATTEST:
/s/ R. O. POTCHERNICK
Assistant Secretary

(Acknowledged by Atlantic July 9, 1957.)
(Acknowledged by Tennessee July 8, 1957.)

• • •

Acceptance of Certificate of Public Convenience and Necessity

[956] Pursuant to ordering Paragraph (C) of the Commission's "Order Upon Application for Rehearing, Adopting Initial Decision of Presiding Examiner with Modifications and Conditions" issued June 24, 1957, The Atlantic Refining Company hereby accepts the Certificate of Public Convenience and Necessity issued to it by such order authorizing the sale of natural gas to Tennessee Gas Transmission Company from Atlantic's interest in production from leases in the East Cameron, West Cameron and Vermilion Areas off the coast of Louisiana in the Gulf of Mexico; without, however, admitting or conceding any asserted jurisdiction of the Federal Power Commission except to the extent required by law.

Respectfully submitted,

THE ATLANTIC REFINING COMPANY

By R. A. Sunkel

(Sworn to July 5, 1957.)

* * * *

[958] I, M. M. MILLER, an Assistant-Secretary of THE ATLANTIC REFINING COMPANY, certify that at a regular meeting of the Board of Directors of THE ATLANTIC REFINING COMPANY, a Pennsylvania corporation, held at 260 South Broad Street, Philadelphia, Pennsylvania, on May 1, 1956, at which a quorum was present and voting throughout, the following resolution was duly adopted:

> RESOLVED, That the President or any Vice President or the Treasurer of the Company be and each of them hereby is severally authorized and empowered

in the name and on behalf of the Company to make, execute, authenticate, acknowledge and deliver any contract, agreement, release, assignment, lease, conveyance, deed, transfer of real or personal property, or any other instrument, which he may deem necessary or proper in connection with the business of the Company, without further act or resolution of this Board, and the Secretary or any Assistant Secretary be and each of them hereby is severally authorized and empowered to affix the corporate seal to any such papers or documents and to attest the same in cases where such action is necessary or appropriate.

I further certify that the above-mentioned resolution is presently in force and effect and has been in force and effect since the aforesaid date of its adoption. I do further certify that L. A. SUNKEL is a duly elected, qualified and acting Vice President of THE ATLANTIC REFINING COMPANY and has been such at all times subsequent to May 1, 1956.

WITNESS my hand and the official seal of said THE ATLANTIC REFINING COMPANY this 5th day of July, 1957.

M. M. MILLER
Assistant Secretary

(Sworn to July 5, 1957.)

Amendment of Gas Purchase and Sales Agreement between Tennessee Gas Transmission Company and Tidewater Oil Company

* * *

[961] WHEREAS, by an instrument dated August 14, 1956, Tennessee Gas Transmission Company, a Delaware corporation, as Buyer, and Tidewater Oil Company, a Delaware corporation, as Seller, entered into a Gas Purchase and Sales Agreement covering gas to be produced from certain leases therein described in the East Cameron, West Cameron and Vermilion Areas of the Continental Shelf of the Gulf of Mexico, to which instrument reference is here made for all purposes; and

WHEREAS, both parties desire to amend said Gas Purchase and Sales Agreement as herein provided to comply with Paragraph (B) of the order of the Federal Power Commission issued June 24, 1957, in its Docket No. G-11024 et al;

NOW, THEREFORE, in consideration of the premises and for other good and valuable considerations, the receipt and sufficiency of which are hereby acknowledged, it is agreed that the above described Gas Purchase and Sales Agreement shall be amended as follows:

[962] "If and in the event that H. R. 6790 or any substantially similar legislation is enacted into law by the 85th Congress, and becomes effective, then the provisions of Section 10, *Prices*, commencing with the portion thereof reading

'From the date of initial delivery or November 1, 1957, whichever occurs first, until November 1, 1962 ..... 21.4 Cents per Mcf'

to and including that portion thereof reading

'From November 1, 1986 to expiration of this contract ..... 35.4 Cents per Mcf'

Amendment of Gas Purchase and Sales Agreement between Tennessee Gas Transmission Company and Tidewater Oil Company

is hereby deleted, and the following is substituted in lieu thereof:

From the date of initial delivery or November 1, 1957, whichever occurs first, and thereafter ..... 21.4 Cents per Mcf

Provided that, after November 1, 1962, Seller shall be entitled to receive and Buyer shall pay the reasonable market price, if higher than 21.4 cents per Mcf, for the gas at the points of delivery within the limitations and subject to the terms and conditions as hereinafter set forth. Such reasonable market price shall be that as fixed by the Federal Power Commission under applicable law, after initial determination thereof by Seller as herein provided. If Seller should determine that the reasonable market price for the gas at the points of delivery for any of the 4-year periods hereinafter listed would be in excess of the price then being paid hereunder, Seller may notify Buyer, not less than eight months prior to the commencement of such period, of the price to be paid by Buyer hereunder during [963] such period and until a subsequent determination by Seller in accordance herewith is made effective. Any price so determined and fixed shall be not less than 21.4¢ per Mcf and not more than:

23.4 Cents per MCF ..... From November 1, 1962 to November 1, 1966

25.4 Cents per MCF ..... From November 1, 1966 to November 1, 1970

Amendment of Gas Purchase and Sales Agreement between Tennessee Gas Transmission Company and Tidewater Oil Company

27.4 Cents per MCF ..... From November 1, 1970 to November 1, 1974

29.4 Cents per MCF ..... From November 1, 1974 to November 1, 1978;

and, in the event the term of this contract is extended hereunder beyond November 1, 1978, then not more than

31.4 Cents per MCF ..... From November 1, 1978 to November 1, 1982

33.4 Cents per MCF ..... From November 1, 1982 to November 1, 1986

35.4 Cents per MCF ..... From November 1, 1986 to the expiration of this contract.

Except as altered hereinabove, the provisions of Section 10, *Prices,* shall remain unaffected and in full force and effect."

In the event that the above described Federal Power Commission order of June 24, 1957, does not become final, this Amendment shall be null and void. Except as herein [964] expressly modified, the above described Gas Purchase and Sales Agreement shall remain in full force and effect in accordance with all of its terms and provisions.

Amendment of Gas Purchase and Sales Agreement between Tennessee Gas Transmission Company and Tidewater Oil Company

EXECUTED IN DUPLICATE ORIGINALS on this the 8th day of July, 1957.

TENNESSEE GAS TRANSMISSION COMPANY
By s/ HAROLD BURROW
Senior Vice President

ATTEST:

s/ LAVERNE E. COLLINS
Assistant Secretary

SEAL

TIDEWATER OIL COMPANY
By s/ E. B. MILLER, JR.
Vice President

ATTEST:

s/ CLYDE E. WILLBERN
Assistant Secretary

SEAL

(Acknowledged by Tennessee July 8, 1957.)

(Acknowledged by Tidewater July 11, 1957.)

• • •

Letter, dated July 18, 1957, from Continental Oil Company to Secretary Transmitting the Former's Acceptance of Certificate of Public Convenience and Necessity and Resolution of Board of Directors, Received, July 22, 1957

CONTINENTAL OIL COMPANY

July 18, 1957

[966] Mr. Joseph H. Gutride, Secretary
Federal Power Commission
Washington 25, D. C.

Re: Docket No. G-11024
In the Matter of
Continental Oil Company

Dear Sir:

In accordance with Section (C) of your Order issued under date of June 24, 1957 in the captioned docket, you will find attached the acceptance, under oath, by Continental Oil Company of the certificate issued to it in such Order, accompanied by a resolution of the Board of Directors of Continental Oil Company, duly authenticated, indicating approval of such acceptance.

Very truly yours,

CONTINENTAL OIL COMPANY

By:

Fred B. Willson
Coordinator of Natural Gas Sales

and

By:

Roland B. Voight
Attorney

RBV—JG

• • •

Letter, Dated July 16, 1957, from Tidewater Oil Company to Secretary Accepting Certificate of Public Convenience and Necessity and Transmitting Resolution of Board of Directors

[Letterhead of TIDEWATER OIL COMPANY]

July 16, 1957

[971] Mr. Joseph H. Gutride, Secretary
Federal Power Commission
Washington, D. C.

Dear Mr. Gutride:

By order issued June 24, 1957, in Docket No. G-11049, the Commission granted a certificate of public convenience and necessity to Tidewater Oil Company, authorizing it to sell and deliver gas from the Cameron, West Cameron and Vermilion off-shore areas under and in accordance with the contract between Tidewater and Tennessee Gas Transmission Company dated August 14, 1956.

Paragraph (C) of said order required the acceptance in writing under oath by each of the selling companies of the certificates issued to them by said order. In compliance with Paragraph (C), Tidewater hereby accepts such certificate and in further compliance therewith there is attached hereto a duly authenticated resolution of the Board of Directors of Tidewater, authorizing the acceptance of such certificate and directing that the same be done.

Very truly yours,

TIDEWATER OIL COMPANY

By s/ LLOYD ARMSTRONG
Lloyd Armstrong
Assistant General Manager
Southern Division

Letter, Dated July 16, 1957, from Tidewater Oil Company to Secretary Accepting Certificate of Public Convenience and Necessity and Transmitting Resolution of Board of Directors

SUBSCRIBED AND SWORN TO before me, this the 16th day of July, 1957.

s/ EMMA M. BUTLER
Notary Public in and for
Harris County, Texas

Seal

[973] I, EDWARD H. HERMSEN, Assistant Secretary of Tidewater Oil Company, do hereby certify that the following is a true and correct excerpt from the minutes of the meeting of the Board of Directors of the Company held on the 11th day of July, 1957:

WHEREAS, the Federal Power Commission on June 24, 1957 issued its order in the Matters of Continental Oil Company, et al, Dockets Nos. G-11024, et al, wherein, among other things, it granted a Certificate of Public Convenience and Necessity to the Company in Docket No. G-11049, authorizing it to sell and deliver gas to Tennessee Gas Transmission Company from the East Cameron, West Cameron and Vermilion offshore areas under the terms and conditions of the contract between the Company and Tennessee Gas Transmission Company, dated August 14, 1956, upon certain conditions as set forth in said order, requiring amendment of the contract and the filing of such amendment within twenty (20) days after the issuance of the order, and the acceptance in writing by each of the selling companies, including Tidewater, of said certificates under oath and such acceptance to be accompanied by a resolution of the Board of Directors of the accepting com-

Letter, Dated July 16, 1957, from Tidewater Oil Company to Secretary Accepting Certificate of Public Convenience and Necessity and Transmitting Resolution of Board of Directors

pany, duly authenticated, indicating the approval of the acceptance of the certificate so granted; now therefore be it

RESOLVED, that the officer of the Company be and they are hereby authorized to amend the contract between the Company and Tennessee Gas Transmission Company, dated August 14, 1956, as is required by paragraph (B) of the aforesaid order of the Federal Power Commission issued on June 24, 1957, and the said officers are hereby authorized and directed to accept in writing and under oath the certificate issued to the Company in said order, and such actions are hereby in all things authorized and approved. Such officers are further authorized to take such other actions as may be necessary in the premises fully to comply with the said contract, as amended, and the said order of June 24, 1957.

EDWARD H. HERMSEN
Assistant Secretary

SUBSCRIBED AND SWORN TO BEFORE ME, this the 11th day of July, 1957.

M. WILSON
Notary Public in and for the City & County of San Francisco, State of California,
My Commission Expires January 17, 1960

• • •

Application of Long Island Lighting Co. for Rehearing, Docket Nos. G-11024, *et al.*, Filed July 23, 1957

* * *

[975] The Long Island Lighting Company (Long Island), pursuant to the provisions of Section 19(a) of the Natural Gas Act and the Commission's Rules of Practice and Procedure, hereby makes application for rehearing of the Commission's Findings and Order issued June 24, 1957, in the above entitled proceedings.

In support of its said Application Long Island shows the following:

I

The Long Island Lighting Company supplies gas service to approximately 300,000 customers within a territory consisting of the former Fifth Ward of the Borough of Queens, New York City, and the Counties of Nassau and Suffolk on Long Island in New York State.

II

[976] Long Island is a customer of Tennessee Gas Transmission Company and obtains a portion of its natural gas supply from Tennessee as authorized by this Commission.

III

Long Island as a customer of Tennessee is vitally interested in the effect on Tennessee's rates of the gas purchases Tennessee proposes to make from the applicant's in this proceeding at the prices and contract conditibns set forth in Tennessee's contracts with these applicants. As Long Island obtains the balance of its natural gas not obtained from Tennessee from another pipeline supplier which purchases gas to supply its customers in the same Gulf Coast area of Louisiana as Tennessee, Long Island

is also concerned with the effect that the high prices Tennessee proposes to pay these applicants will have on the price of additional pipeline purchases of gas in the Gulf Coast area.

IV

By order issued by this Commission on February 27, 1957, Long Island was allowed to intervene in this proceeding and did actively participate in the entire proceeding by being represented at the hearings, by filing an initial and reply brief, by filing exceptions to the Examiner's decision and an answer to applicants' motions to modify the Commission's original order issued April 22, 1957, and by being represented by [977] counsel at the oral argument before the Commission on June 12, 1957.

V

The Commission in modifying its order issued May 20, 1957, by the issuance of its order of June 24, 1957, is in error.

The basic issue in a certificate proceeding is whether the proposed service is in the public interest. The courts have held repeatedly that the primary purpose of the Natural Gas Act is the protection of consumers. This basic purpose of the Act cannot be fulfilled in producer certificate cases unless the Commission, in determining whether the proposed service is in the public interest, considers not only the need for the additional gas to be supplied, but also the effect of the proposed service on the pipeline's rates.

This Commission in a producer certificate proceeding cannot lawfully grant permanent certificates to the pro-

ducer applicants unless the rate level at which the proposed service is to be rendered has been shown by competent evidence to be in the public interest.

In this proceeding this Commission itself has twice found that the record contains insufficient evidence or testimony on which the Commission can base a finding that public convenience and necessity requires the sale of the volumes of gas by the producer applicants herein at the particular rate level here proposed.

In its order of April 22, 1957, the Commission said in part:

> [978] "The record contains insufficient evidence or testimony, however, on which to base a finding that the public convenience and necessity requires the sale of these volumes of gas at the particular rate level here proposed. The importance of this issue in certifying this sale cannot easily be overemphasized. This is the first sale from the newly developed offshore fields from which large proportions of future gas supplies will be taken. This is the highest price level at which the sale of gas to Tennessee Gas has been proposed.
>
> These factors make it abundantly evident that, in the public interest, this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest. See *Cities Service Gas Co., Signal Oil and Gas Co.*, 14 F.P.C. , opinion No. 288, Nos. G-2569, G-2570, November 28, 1955, affirmed as *Signal Oil and Gas Co.* v. *F.P.C.*, 238 F. 2d 771 (CA 3), certiorari denied, 353 U.S. 923. • • •"

Application of Long Island Lighting Co. for Rehearing
Docket Nos. G-11024, et al., Filed July 23, 1957

Again in its May 20, 1957 order in referring to the proposed initial price of 21.4 cents per M.C.F. plus one cent Louisiana gathering tax, this Commission said:

> "As we have already stated, the record does not contain sufficient evidence on which to base a finding that the public convenience and necessity requires the sale of gas at that particular rate level."

Absent sufficient evidence on which the Commission can base a finding that the public convenience and necessity requires the sale of the gas by these applicants at the proposed rates, this Commission cannot lawfully determine that the proposed service is in the public interest and grant permanent certificates of public convenience and necessity to the producer applicants as it has done by its June 24, 1957 order.

VI

[979] The Commission is in error in finding and concluding in its order of June 24, 1957 as follows:

> "In the present status of the case we are left with the difficult problem of how to assure the delivery of this gas to the large market served by Tennessee Gas, and at the same time protect the consumers from an unreasonably high price. In reaching a solution to this problem we are moved by the primary consideration that the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas. Further, it appears to us, important as is the issue of price, that as far as the public is concerned, the precise charge that is made initially is less important than

Application of Long Island Lighting Co. for Rehearing, Docket Nos. G-11024, et al., Filed July 23, 1957

the assurance of this great supply of gas. In view of the circumstances and the fact that the record does not show that the 21.4 cent rate is necessarily excessive, we agree with the presiding examiner that this certificate proceeding under Section 7 of the Natural Gas Act should not assume the character of a rate proceeding under Section 5(a). We are of the opinion that, in the circumstances of this case, in view of the great demand for gas by customers of Tennessee Gas, the price considerations should not be made the prime determinant of what the public convenience and necessity require. • • •"

The Commission as a matter of law cannot grant these producer applicants permanent certificates upon a determination based entirely on a claimed need for additional natural gas by Tennessee's customers. A proper and lawful certificate can only be granted under the Natural Gas Act on a determination based on adequate evidence that the applicants are able and willing to furnish the proposed service, the proposed sales of natural gas to Tennessee are required, *and* that the rates under which the proposed service will be rendered are in the public interest. The Commission cannot, as it has done by its order of June 24, [980] 1957, ignore or postpone its determination of the issue of the proposed price and grant these applicants permanent certificates solely upon a showing that the applicants are able and willing to provide the proposed service and a need for the gas by Tennessee's customers, particularly where, as in this instance, the Commission itself has twice found that the record does not contain sufficient evidence upon which the Commission

Application of Long Island Lighting Co. for Rehearing
Docket Nos. G-11024, et al., Filed July 23, 1957

Again in its May 20, 1957 order in referring to the proposed initial price of 21.4 cents per M.C.F. plus one cent Louisiana gathering tax, this Commission said:

> "As we have already stated, the record does not contain sufficient evidence on which to base a finding that the public convenience and necessity requires the sale of gas at that particular rate level."

Absent sufficient evidence on which the Commission can base a finding that the public convenience and necessity requires the sale of the gas by these applicants at the proposed rates, this Commission cannot lawfully determine that the proposed service is in the public interest and grant permanent certificates of public convenience and necessity to the producer applicants as it has done by its June 24, 1957 order.

VI

[979] The Commission is in error in finding and concluding in its order of June 24, 1957 as follows:

> "In the present status of the case we are left with the difficult problem of how to assure the delivery of this gas to the large market served by Tennessee Gas, and at the same time protect the consumers from an unreasonably high price. In reaching a solution to this problem we are moved by the primary consideration that the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas. Further, it appears to us, important as is the issue of price that as far as the public is concerned, the precise charge that is made initially is less important than

> the assurance of this great supply of gas. In view of the circumstances and the fact that the record does not show that the 21.4 cent rate is necessarily excessive, we agree with the presiding examiner that this certificate proceeding under Section 7 of the Natural Gas Act should not assume the character of a rate proceeding under Section 5(a). We are of the opinion that, in the circumstances of this case, in view of the great demand for gas by customers of Tennessee Gas, the price considerations should not be made the prime determinant of what the public convenience and necessity require. . . ."

The Commission as a matter of law cannot grant these producer applicants permanent certificates upon a determination based entirely on a claimed need for additional natural gas by Tennessee's customers. A proper and lawful certificate can only be granted under the Natural Gas Act on a determination based on adequate evidence that the applicants are able and willing to furnish the proposed service, the proposed sales of natural gas to Tennessee are required, *and* that the rates under which the proposed service will be rendered are in the public interest. The Commission cannot, as it has done by its order of June 24, [980] 1957, ignore or postpone its determination of the issue of the proposed price and grant these applicants permanent certificates solely upon a showing that the applicants are able and willing to provide the proposed service and a need for the gas by Tennessee's customers, particularly where, as in this instance, the Commission itself has twice found that the record does not contain sufficient evidence upon which the Commission

can determine that the rate level at which the proposed service is to be rendered is in the public interest and required by the public convenience and necessity.

VII

The Commission is in error in abandoning the position it has taken in its previous orders of April 22, 1957 and May 20, 1957, in the face of the threats of these producer applicants to cancel their contracts with Tennessee and withdraw this gas from the interstate market unless the Commission certificates the service only on the terms demanded by these applicants themselves.

The inevitable result of the Commissioner's decision is obvious and far reaching. Producer applicants will, under threats to cancel their contracts with pipelines, as these producer applicants have done, demand and set higher and higher initial prices for their gas. On records barren of any evidence upon which a proper determination can be made that the initial price is reasonable and in the public interest, producers will demand the issuance of permanent certificates on their own terms. [981] Always it will be claimed that the need for the additional gas outweighs any consideration of the initial price.

The position taken by the Commission in this proceeding by its June 24th order with respect to its refusal to consider in the certificate proceeding the initial price to be paid these applicants is not only unsound but unlawful in that it does not provide Tennessee's customers and their consumers with the protection against unreasonable initial prices that is required by the Natural Gas Act.

Application of Long Island Lighting Co. for Rehearing, Docket Nos. G-11024, et al., Filed July 23, 1957

VIII

The Commission is in error in assuming as it does by its June 24, 1957 order, that by postponing any decision as to whether the applicants' initial rates are reasonable and in the public interest to the subsequent 5(a) proceedings that it has ordered, Tennessee's customers and their consumers are protected in the manner required by the Natural Gas Act.

Presumably applicants' rate schedules for the proposed service will not be filed until shortly before their deliveries to Tennessee actually commence in November. At that time the 5(a) investigations which the Commission has ordered will begin. After these investigations are completed, hearings will be held and the Commission's customary procedural process followed resulting finally in a Commission order with respect to the applicants' initial rates. All of this would take time.

[982] As the Commission's order in a 5(a) proceeding with respect to rates speaks only prospectively and not retroactively, the untested initial rates would be in effect from the time when deliveries of gas commenced until the date of the Commission's order. Should the Commission eventually determine that the applicants' initial rates were in fact unjust and unreasonable and order them reduced, the applicants would not be required to make any refunds on deliveries made at the initial contract prices up to the date of the Commission's order. In practical effect this imposes all of the burden of any regulatory lag on the customers of Tennessee and permits the applicants to be paid a rate for their gas delivered to Tennessee which rate the Commission may subsequently determine is unjust and unreasonable.

Furthermore, as Commissioner Connole states in his dissent, the controlling reason why these applicants have demanded the 5(a) procedure ordered by the Commission is their desire to have the burden placed on the Commission or complainants to establish that the applicants' initial rates are more than reasonable, instead of themselves having the burden of establishing that the proposed initial rates are reasonable and in the public interest as the procedure specified in the Commission's order of May 20, 1957, would require.

The Commission itself in the Cities Service-Signal Oil and Gas Co. proceeding by its opinion No. 288 has recognized these weaknesses [983] of the postponing consideration of the initial price issue in producer certificate proceedings to subsequent 5(a) proceedings. In that opinion the Commission held that the applicant-seller had the burden in a certificate case of proving all elements of its application so that the Commission could conclude that the proposed service was in the public interest and required by the present and future public convenience and necessity. At page 19 of its Opinion No. 288 the Commission clearly stated that a vital element of such proof in a certificate case is concerned with the rates proposed.

By its order of June 24, 1957 the Commission has repudiated its doctrine of the *Signal Oil* case which has been sustained by the courts and denied Tennessee's customers and their consumers the full and adequate protection against unjust and unreasonable initial rates that the Natural Gas Act provides.

In its order of May 20, 1957 the Commission refers to another reason why a 5(a) review of the initial prices

may not afford Tennessee's customers and their consumers full protection against an unjust and unreasonable initial price. The Commission in its May 20th order stated:

> "Furthermore, under the provisions of the so-called Harris Bill, if it is enacted into law, the proposed initial price might no longer be subject to adjustment by us."

While the Commission in this proceeding must proceed under [984] the existing law, the Commission is not to be presumed to be unaware of the effect of a proposed bill now before Congress.

By its May 20th order the Commission provided an effective procedure that was fair and equitable to all parties, and provided adequate protection to Tennessee's customers and their consumers, both under the present law and under the proposed Harris Bill if enacted.

In the event of the enactment of the so-called Harris Bill, the Commission by its order of June 24, 1957 and the 5(a) procedure provided therein, has removed the protection against this very contingency that concerned the Commission as indicated by the above quotation from its May 20th order.

IX

The Commission is in error in adopting the findings of fact and conclusions of the presiding examiner in this proceeding to the extent that such findings and conclusions have been excepted to by Long Island. In support of this statement reference is made to the exceptions previously filed to the presiding examiner's findings and

conclusions by Long Island jointly with The Brooklyn Union Gas Company.

X

In its June 24 decision, the Commission made this case turn on a finding that Tennessee's customers are so sorely in need of additional gas that regardless of the price, these contracts should be approved. It is [985] respectfully submitted, however, that the record does not support that finding; indeed, the record is strangely silent on that question. The only reference in the record as to Tennessee's customers' need for this gas is the bare statement that Tennessee's purpose in making these contracts was to obtain gas reserves to supply the expansion of Tennessee's markets as shown by its application in Docket G-11, 107. No reference was ever made to Tennessee's pending proposal to expand its system to supply an entirely new mid-western market area in competition with other gas pipe line companies. Information available to the Commission elsewhere in its files casts serious doubt on the correctness of this finding. Tennessee cannot be shown on this record to be in bad shape from the point of view of reserves to supply the needs of its existing customers. The primary reason Tennessee reached for this gas and outbid everybody else was that Tennessee's expansion plans—for new markets to be served by its subsidiary, Midwestern Gas Transmission Company, rather than increased requirements for existing customers—would have depleted Tennessee's reserves to the point where a large additional supply of gas was desirable if it was to serve the expanded needs of its existing customers. Looking at the situation overall, then, this gas is

not urgently needed for Tennessee's existing customers but rather because of its proposed expansion into new markets.

Moreover, the Tennessee system has competition for the new [986] mid-western market from other pipelines and they presumably have contracted for the gas requirements of the territory they too wish to serve. If this Commission were in effect to allow each of the competing pipelines to bid up the price of gas in order to secure a supply which will be required by only one of them, the result is double pressure on the purchasing end of the gas market, which can lead only to a repetition of the chaotic markets which the CATCO contracts have already produced.

XI

The Commission's order of May 20, 1957, issued in this proceeding is a lawful and proper order, fair, equitable and just to all parties to this proceeding and should not be modified.

WHEREFORE, Long Island for the reasons herein set forth respectfully makes application to this Commission for a rehearing in this proceeding.

Respectfully submitted,

LONG ISLAND LIGHTING COMPANY

By .....
Charles E. Elbert, Secretary

Dated at Mineola, New York,
this 23rd day of July, 1957.

(Sworn to July 23, 1957.)

• • •

Application of Public Service Electric and Gas Company for Rehearing and Motion for Stay, Docket Nos. G-11024, *et al.*; Filed July 23, 1957

* * *

[991] Public Service Electric and Gas Company (Public Service), intervenor, pursuant to Section 19(a) of the Natural Gas Act, As Amended, and Section 1.34 of the Commission's Rules of Practice and Procedure, hereby applies for a rehearing of the Commission's "ORDER, UPON APPLICATION FOR REHEARING, ADOPTING INITIAL DECISION OF PRESIDING EXAMINER WITH MODIFICATIONS AND CONDITIONS", issued in these proceedings on June 24, 1957. In support hereof Public Service respectfully shows as follows:

1. On June 24, 1957, the Commission issued an order granting permanent certificates of public convenience and necessity to the above-named applicants authorizing the construction and operation of certain facilities and the sale of natural gas to Tennessee Gas [992] Transmission Company (Tennessee) from leases off the coast of Louisiana in the Gulf of Mexico. The order of June 24, 1957, changed and superseded the order of the Commission, issued in these same proceedings on May 20, 1957, which said order in turn changed and superseded the order issued April 22, 1957, in these proceedings.

In the order of April 22nd, the Commission granted temporary certificates to the applicants and stated that:

> *"The record contains insufficient evidence or testimony, however, on which to base a finding that the public convenience and necessity requires the sale of these volumes of gas at the particular rate level here proposed. The importance of this issue in certificating this sale cannot easily be overemphasized.* This is the largest reserve ever com-

mitted to one sale. This is the first sale from the newly developed offshore fields from which large proportions of future gas supplies will be taken. This is the highest price level at which the sale of gas to Tennessee Gas has been proposed.

"These factors make it abundantly evident that, in the public interest, this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest. See *Cities Service Gas Co., Signal Oil and Gas Co.*, 14 F.P.C.—Opinion No. 288, Nos. G-2659, G-2570, November 28, 1955, affirmed as *Signal Oil and Gas Co.* v. *F.P.C.*, 238 F. 2d 771 (CA3), certiorari denied, 353 U. S. 923." (Underlining supplied.)

[993] The Commission remanded the proceedings to the Presiding Examiner to determine at what rate the public convenience and necessity requires the sale of natural gas by Continental Oil Company, The Atlantic Refining Company, Cities Service Production Company and Tidewater Oil Company (CATCO) to Tennessee to be made. The Commission further specified that the burden of proof and the burden of going forward with the presentation of evidence shall be upon the applicants herein, the CATCO companies and Tennessee.

The order of the Commission issued May 20, 1957, changed the order of April 22, 1957, by granting permanent certificates of public convenience and necessity in place of temperory certificates to CATCO, permitting the applicants to sell natural gas to Tennessee and to construct and operate the necessary facilities. This order reiterated the fact that:

Application of Public Service Electric and Gas Company For Rehearing and Motion for Stay, Docket Nos. G-11024, et al., Filed July 23, 1957

> *"As we have already stated, the record does not contain sufficient evidence on which to base a finding that the public convenience and necessity requires the sale of the gas at that particular rate level. * * *"* (Italics supplied)

Accordingly, the Commission conditioned the issuance of the certificates and required each of the CATCO companies to amend its contract with Tennessee so as to provide that the initial price shall be 18¢ per Mcf instead of 22.4¢ per Mcf.

[994] The order issued June 24, 1957, granted permanent certificates to the applicants without any condition affecting the initial price of 21.4¢ per Mcf. Concurrently with this order the Commission issued an investigation of the rates and charges of Cities Service. The order of June 24, 1957, noted that rate investigations were already proceeding with respect to the other three applicants.

In the orders issued April 22nd and May 20th, the Commission clearly found as a fact that the record does not contain sufficient evidence on which to base a finding that the public convenience and necessity requires the sale of the gas at 22.4¢ per Mcf. No evidence has been supplied or introduced since the Commission's orders of April 22nd and May 20th which would cure the fatal defect in the proof and it is, therefore, respectfully submitted that the Commission erred in departing from the findings made in its two prior orders that the record does not contain sufficient evidence on which to base a finding that the public convenience and necessity requires the sale of the gas at the rate level proposed. The factors, which the

Commission found made it abundantly evident that in the public interest this crucial sale should not be permanently certificated unless the rate level had been shown to be in the public interest, remain unchanged and still require [995] the applicants to prove that their applications are in the public interest.

2. The applicants failed to meet the requirements for the issuance of certificates of convenience and necessity in that they failed to present probative evidence that the proposed sale is or will be required by the present or future public convenience and necessity in accordance with Section 7(e) of the Natural Gas Act.

3. The Commission erred in relieving the applicants of the burden of proof and the burden of going forward with the presentation of evidence on the issue of the rate at which the public convenience and necessity requires the sale to be made. The substitution of Section 5(a) proceedings does not protect the customers of Tennessee nor the consuming public because the applicants are permitted to charge the contract price of 22.4¢ with no provision for repayment of any overcharges which might subsequently be determined.

At the proposed delivery rate of 240,000 Mcf per day, the annual payments by Tennessee to the CATCO group at the 22.4¢ price would be in excess of $19,600,000; at an 18¢ price, the annual payments would be slightly under $15,800,000, or a difference of $3,850,000 annually. The customers of Tennessee and the [996] consuming public will, as a result, be unlawfully deprived of approximately $3,850,000 per year for some years to come. It is well

known that rate investigations are time consuming and in the instant proceedings the applicants have represented to the Commission that they could not present sufficient evidence in justification of the rate within any reasonable period of time in the future. If the applicants themselves are faced with this dilemma, certainly the Commission's Staff and this intervenor would be faced with even greater difficulty, to the detriment of the ultimate consumers of the natural gas and an unlawful windfall to the producer applicants will result. Certificate applications which contain such inherent defects as to require immediate institution of a rate investigation and under which the applicants are relieved of their statutory burden of proof are unlawful and certainly not in the public interest. Section 5(a) proceedings applied to certificate applications do not adequately protect consumers within the meaning and intent of the Natural Gas Act.

4. The record in these proceedings does not contain competent material and relevant evidence which supports the finding of the Commission that the public served through the Tennessee system is greatly in need of increased supplies of natural gas.

[997] 5. The Commission erred in adopting the findings of fact and the conclusions of the Presiding Examiner that the applicants had proved by competent evidence that they are able and willing properly to do the acts and to perform the service proposed, and to conform to the provisions of the Natural Gas Act and the applicable rules, regulations, and orders of the Commission.

6. The Commission erred in that it did not attach a rate condition to the certificates which the present and

future public convenience and necessity required the Commission to do, based on the record and the law as set forth in the matters of *Cities Service Gas Company and Signal Oil and Gas Company,* Docket Nos. G-2659 and G-2570, affirmed 238 F. 2d 771, certiorari denied 353 U. S. 923.

7. The absence of competition among the four sellers as disclosed by the record imperatively requires the exercise by the Commission of its power to impose a rate condition which will assure that the services authorized will be initially rendered under reasonable rates. It would only be by coincidence that the Commission will ultimately find that the cost of service for the four companies requires the establishment of identical rates of 22.4¢ per Mcf. The order of the Commission issued June 24, 1957, assumes without any [998] proof whatsoever that this most unlikely coincidence exists.

8. The Commission erred in not imposing a rate condition because the actual price which Tennessee will be obligated to pay cannot be determined from the evidence for the reasons that:

(a) In addition to the stated initial price of 22.4¢ per Mcf, Tennessee will be required to spend over $16,000,000 in order to construct the gathering facilities.

(b) The record does not contain any evidence from which it can be determined what operating expenses will be incurred by Tennessee.

(c) Tennessee is required by the contracts to transport liquefiable hydrocarbons for the applicants at no charge.

(d) Tennessee is obligated to construct up to 40 miles of additional pipe line per year.

(e) Another condition in the contracts permits the applicants to deliver to Tennessee the higher priced offshore gas from the CATO fields in lieu of the cheaper gas presently dedicated to Tennessee from the West Delta area.

9. The Commission erred in adopting the Examiner's findings that the contracts were entered into as a result of arms-length bargaining and failed to [999] properly inquire into the relationship between the applicants concerning the negotiations leading to the contracts to sell the gas in question.

10. The Commission erred in that it adopted the Examiner's finding that the effect of the proposed service on Tennessee's rates is not an issue to be considered in this certificate proceeding.

11. The Commission erred in that it gave consideration to the representations of the applicants at the oral argument held on June 12, 1957, that they were unwilling to carry the burden of proof as to price and in the event any price conditions were imposed such as were contained in the prior orders of April 22nd and May 20th, that they would not sell the gas to Tennessee nor even in the interstate market.

WHEREFORE, Public Service respectfully requests that the Commission grant this Application for Rehearing as

Application of Public Service Electric and Gas Company For Rehearing and Motion for Stay, Docket Nos. G-11024, et al., Filed July 23, 1957

requested by this intervenor and pending such action stay the effectiveness of its order issued June 24, 1957.

Respectfully submitted,

PUBLIC SERVICE ELECTRIC AND GAS COMPANY

By: (Signed) EDWARD S. KIRBY
Edward S. Kirby
Attorney for Public Service Electric and Gas Company

Dated: Newark, New Jersey
July 19, 1957.

(Sworn to July 19, 1957)

• • •

Application of New York Commission for Rehearing and Rescission of the Order Issued June 24, 1957, Docket Nos. G-11024, *et al.*, Filed July 23, 1957

* * *

[1003] The Public Service Commission of the State of New York, an interested State Commission aggrieved by the order issued herein on June 24, 1957, hereby applies for rehearing pursuant to the provisions of Section 19(a) of the Natural Gas Act. We request the Federal Power Commission to reconsider and rescind its order of June 24, 1957, and to reaffirm either of the orders previously issued in these matters on April 22, 1957, and on May 20, 1957.

Nature of Exceptions

We except to the *conclusion* that public convenience and necessity requires or permits the issuance of permanent certificates herein at the proposed initial price of 22.4 cents per Mcf, on the ground that said conclusion is not supported by adequate evidence in the record or by adequate findings.

[1004] We except to the *finding* that the public served through the system of Tennessee Gas Transmission Company is greatly in need of increased supplies of natural gas, on the ground that there is not a shred of evidence in this record to support the finding, and on the further ground that even if a need for additional supplies at prices no higher than those currently paid may be presumed, need for gas at 22.4 cents cannot.

ARGUMENT IN SUPPORT OF APPLICATION

A. Inadequacy of the evidence to support the finding that the public served through Tennessee is greatly in need of increased supplies of natural gas.

The record in this proceeding does not contain a single word of *testimony* to suggest, let alone support the finding,

that Tennessee's customers need additional gas. The unsworn and wholly unsupported assertions of Tennessee's Counsel to the effect that certain distributing company customers, one month *before* consummation of the CATCO contract, indicated a desire for additional gas, does not fill this void. Nor is that the kind of "evidence" upon which an administrative agency may lawfully base a finding.

Our motion to consolidate Tennessee's certificate application, G-11107, with the instant proceeding in order to facilitate *proof* of such alleged "need" was opposed by the applicants and denied by the Commission by an order issued herein on March 29, 1957.

[1005] These factors (the absence of any evidence in this record of the need for gas and the applicants' unwillingness to submit such proof in this proceeding), together with the failure of any of Tennessee's customers to appear in support of the application, and Tennessee's notoriously zealous efforts to persuade opponents of the application to absent themselves from Washington, all cast considerable doubt as to how much, if any, additional gas in desired or "needed" at 22.4 cents per Mcf.

With respect to the April 22, 1957, and May 20, 1957, orders, we do not press the objection that there is no evidence to show a need for the gas, since we do not consider ourselves aggrieved by these orders. In both, the need for additional supplies at reasonable prices was assumed. The most vital aspect of that assumption—price—was left for further inquiry.

We do, however, press this objection most strenuously with respect to the June 24, 1957, order. Underlying that

order is nothing more than a wholly baseless assumption that the consuming public needs gas at any price the producers choose to exact. We respectfully submit that no one can prove that, much less assume it!

[1006] B. Inadequacy of the evidence and the findings to support the conclusion that public convenience and necessity requires or permits the sale at 22.4 cents per Mcf.

The order of June 24, 1957, reveals that the Commission has surrendered its former conviction and ridden roughshod over its former determinations as to the inadequacy of the instant record to justify the sale at 22.4 cents per Mcf, on the basis of two primary considerations: (1) the "great need" for additional gas by the public served through Tennessee, and (2) the ultimatium of the applicants to withdraw the gas from interstate commerce unless the Commission capitulated to their terms.

These considerations have been potential aspects of this case throughout this proceeding. Although they were apparent and fully appreciated on April 22 and May 20, they were not then regarded as sufficient to induce or permit the Commission to certificate unconditionally these sales at the proposed price. That the Commission was thoroughly convinced of a need for this gas long before June 24 is conclusively demonstrated by the fact that it *granted* temporary certificates on April 22 and permanent certificates on May 20. If it had not on those dates implicitly found or assumed a need for the gas, it would have been obliged to deny the applications without further inquiry.

[1007] That it is within the power and discretion of disgrunted applicants to reject certificates and withdraw

the service offered is not a novel consideration which first came to light in this proceeding on June 24. That discretion or power is implicit from start to finish in every producer-certificate case under the Natural Gas Act.

The proceeding, at this juncture, squarely presents the question of what proof is required under Section 7(e) of the Natural Gas Act to permit the issuance of certificates of public convenience and necessity.

Heretofore nothing could have been clearer than the fact that a "vital element" in the proof of public convenience and necessity was concerned with the propriety of the rates proposed in the circumstances surrounding the sale. That had been specifically decided by the Commission in the *Signal Oil* case. See *Cities Service Gas Co., Signal Oil & Gas Co.*, 12 PUR 3d 3, Nos. G-2569, G-2570, Op. No. 288, Nov. 28, 1955. It had been specifically affirmed by the Court in *Signal Oil & Gas Co., v. FPC*, (3rd Cir.) 238 F. 2d 771, cert. den. 353 U. S. 923. It had been specifically reiterated by the Commission in the April 22 and May 20 orders issued in this proceeding.

[1008] We must now consider whether a need for the gas on the part of consumers accompanied by a threat to withdraw the gas on the part of producers, unless they can exact their chosen price, either (1) eliminates the need for consideration of this "vital element", or (2) itself is proof that the rates proposed are justifiable.* It is our contention that the postulate does not lead to either result.

---

* We are unable to ascertain, after several rereadings of the June 24 order, which of these positions the Commission there adopts.

Application of New York Commission for Rehearing and Rescission of the Order Issued June 24, 1957, Docket Nos. G-11024, et al., Filed July 23, 1957

On its face, the Commission's latest order appears to proceed upon the thesis that the *greater* the demand for the gas, the *less* significant is the question of price. That view, we submit, is utterly incompatible with the Natural Gas Act. The primary, if not the sole purpose of the Natural Gas Act is to protect consumers of gas against exploitation by natural gas companies. There can be no opportunity for exploitation unless demand or need for gas exceeds the supply available on the interstate market. Where that situation occurs, that is, where a demand for gas is present, the statute mandates the Commission to protect the consumer against exploitation. It is obvious, therefore, that the *greater* the demand for gas and the *greater* the accompanying opportunity for exploitation, the *more* significance attaches to the issue of price and the *more* vigilance is required of the Commission to protect the consumer.

[1009] The phrase "public convenience and necessity" does not have a fixed content for all time and all circumstances. It is quite meaningless in itself unless it is related to and given a scope consistent with, the purposes and policies of the statute in which it is found. We find it impossible to comprehend how exploitation can be prevented, particularly in the circumstances presented in this proceeding, if the propriety of price is not to be scrutinized.

The Commission's position is not supported by authority, precedent, logic or the statute. It can only be said to constitute an abandonment of the statutory duty owed the consumer and makes it unmistakably plain to the

gas-producing and gas-consuming community alike that if the public wants gas, it is going to have to pay exactly what the producers demand for it. In other words, it would now appear that the Commission is not prepared to offer the consumer one iota more protection than he would have in the unregulated open market if Section 7(e) had never been enacted. We are not hopeful that this feature of the instant proceeding will go unnoticed by the producers.

The always-present power to reject unsatisfactory certificates and the threat to use that power has never, so far as we are aware, been thought to eliminate, modify or affect the proof required by statute to establish public convenience [1010] and necessity. It is inconceivable that it should be otherwise, or that public convenience and necessity should ever require or permit abject submission by a regulatory agency to any ultimatum of a regulated company. If the existence of the power to reject, accompanied by the threat to use it, could eliminate the necessity for proof of one "vital element" of convenience and necessity, it could as readily eliminate the necessity for proof of all other elements. It could justify the issuance of certificates on nothing more than an application together with a threat to reject any certificate which failed to grant everything the application demanded. In the *Signal* case, where the power to reject certificates was every bit as real as it is here, the Commission nevertheless held that proof of the propriety of price was required. Can it be said that the truisms therein espoused become gibberish when the applicant bespeaks himself of that power?

Application of New York Commission for Rehearing and Rescission of the Order Issued June 24, 1957, Docket Nos. G-11024, et al., Filed July 23, 1957

It may be quite true that under the Natural Gas Act the Commission is powerless to compel the dedication of additional gas to interstate commerce. We do not believe, however, that that fact permits emasculation of the provisions of the statute which direct the Commission to control and regulate, for the benefit of the consumer, the terms, conditions and prices at which interstate gas shall flow. The mandate of Section 7(e) that the Commission must scrutinize price in order to fulfill its statutory obligation to protect consumers against exploitation, cannot be ignored simply because applicants *may* be so [1011] ill-advised as to make good their threats to kill the goose that lays their golden egg.

CONCLUSION

The requirement of Section 7(e) of the Natural Gas Act that each applicant prove that public convenience and necessity requires the sale of his gas in interstate commerce at his proposed rate, as enunciated by the Commission in the *Signal Oil* case, as confirmed by the Court in *Signal Oil & Gas Co.* v. *FPC, supra,* and as again reiterated by the Commission on April 22 and May 20, cannot be discharged, nor may the need for such proof be eliminated, simply by noting that the public demands gas and the producers have the power to withhold it.

It is impossible to ignore the fact that the importance of this case now far exceeds the limited issues originally presented. If unsupported allegations of need for gas and untested threats to withhold it will effectively emasculate all semblance of certificate and price regulation, the

lesson is clear not only to the present applicants, but to all producers of natural gas.* On the other hand, if the Commission stands [1012] firm upon its own convictions and upon its judicially blessed interpretation of the requirements of proof under the Natural Gas Act, there is no reason to anticipate dire results. No one can reasonably suggest that all future supplies of gas can be economically marketed in their states of origin. Indeed we are firmly convinced that if the CATCO gas could have been marketed in Louisiana anywhere nearly as profitably as it can in interstate commerce, it would have been sold there long before this. But in any event, when they or any other natural gas companies turn to interstate markets, it should be on terms fully disclosed to and approved by the Federal Power Commission, which has the statutory obligation of protecting the public interest, and not on the terms arrogantly and irresponsibly dictated by the applicants.

The order of June 24, 1957 should be rescinded and either of the orders of April 22 or May 20, 1957 reaffirmed. The evidence in this record is totally inadequate to

* In fact, the pattern is already becoming sharply defined. In its July 12, 1957 order, issued in *Southern Natural Gas Co., et al.*, Doc. Nos. G-11234, *et al.*, the Commission has not only granted certificates of convenience and necessity on inadequate proof pertaining to price, but also has even refused to permit intervention by the New York Commission, thereby precluding any presentation of the issue of the sufficiency of the record in this respect.

support the conclusion that the sale at 22.4 cents per Mcf is required by public convenience and necessity.

Respectfully submitted,

PUBLIC SERVICE COMMISSION OF
THE STATE OF NEW YORK
By /s/ KENT H. BROWN
Kent H. Brown
Counsel
55 Elk Street
Albany 1, New York

Dated: July 22, 1957

(Sworn to July 22, 1957)

• • •

VOLUME II

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1958

No. 518

THE ATLANTIC REFINING COMPANY, CITIES SERVICE PRODUCTION COMPANY, CONTINENTAL OIL COMPANY, ET AL., PETITIONERS,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, LONG ISLAND LIGHTING COMPANY, PUBLIC SERVICE ELECTRIC AND GAS COMPANY.

No. 536

TENNESSEE GAS TRANSMISSION COMPANY, PETITIONER,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, LONG ISLAND LIGHTING COMPANY, AND PUBLIC SERVICE ELECTRIC AND GAS COMPANY.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 518 PETITION FOR CERTIORARI FILED NOVEMBER 14, 1958
NO. 536 PETITION FOR CERTIORARI FILED NOVEMBER 24, 1958
CERTIORARI GRANTED JANUARY 12, 1959

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IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12401

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

FEDERAL POWER COMMISSION, Respondent.

PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION—Filed October 7, 1957

To the Honorable the Judges of the United States Court of Appeals for the Third Circuit:

The petition of the Public Service Commission of the State of New York (hereinafter called "petitioner"), being a petition for review, under Section 19(b) of the Natural Gas Act, 15 U. S. C. A. §717r(b), of an order of the Federal Power Commission (hereinafter called "respondent"), dated June 24, 1957, issued in respondent's consolidated proceeding entitled "*In the Matters of Continental Oil Company,* Docket No. G-11024, *The Atlantic Refining Company,* Docket No. G-11034, *Cities Service Production Company,* Docket No. G-11046 and *Tidewater Oil Company,* Docket No. G-11049," respectfully shows:

[fol. 478]

I.

Parties.

Petitioner, a party to the proceeding below is a Commission created and existing under the laws of the State of New York and is composed of Benjamin F. Feinberg, Chairman, Spencer B. Eddy, Francis T. Mylott, Richard H. Balch, and Aaron L. Jacoby, Commissioners, who are the duly appointed, qualified and acting members of said Com-

mission. Said Commission and the members thereof perform their official duties and have their principal offices at 55 Elk Street, in the City of Albany, State of New York. Petitioner is directed and authorized by Article 4 of New York Public Service Law to exercise general regulatory supervision over gas corporations in the State of New York, including supervision over rates and charges of said companies.

Respondent, the Federal Power Commission, is a Commission created and existing under the laws of the United States and is composed of Jerome K. Kuykendall, Chairman, Seaborn L. Digby, Frederick Stueck, William R. Connole, and Arthur Kline, Commissioners, who are the duly appointed, qualified and acting members of said Commission. Said Commission and the members thereof perform all of their functions and official duties and have their principal offices at 441 G Street, N. W., in the City of Washington, District of Columbia.

II.

Jurisdiction and Venue.

Petitioner was a party in each of four proceedings under Section 7 of the Natural Gas Act before respondent Federal Power Commission entitled respectively "*In the Matter of Continental Oil Company,* Docket No. G-11024", "*In the Matter of Atlantic Refining Company,* Docket No. 11034", [fol. 479] "*In the Matter of Cities Service Production Company,* Docket No. G-11046" and "*In the Matter of Tidewater Oil Company,* Docket No. G-11049" which proceedings were consolidated by order of the respondent Federal Power Commission and heard on a single record. Petitioner is aggrieved by the final order issued therein on June 24, 1957. Jurisdiction and venue are established in this Court by the provisions of Section 19(b) of the Natural Gas Act, 15 U. S. C. A., §717r(b), applicants Continental Oil Company, Cities Service Production Company and Tidewater Oil Company having been incorporated in and under the laws of the State of Delaware and applicant The Atlantic Refining Company having been incorporated in and under the laws of the State of Pennsylvania. Each of the afore-

said applicants are natural gas companies to which the order of June 24, 1957 relates and, as indicated, each is located within the jurisdiction of this Court.

III.

Nature of Proceedings as to Which Review is Sought.

This petition presents to the Court for review a decision and order, issued by respondent Federal Power Commission on June 24, 1957. True copies of said decision and order entitled "Order, Upon Application for Rehearing, Adopting Initial Decision of Presiding Examiner With Modifications and Conditions," together with a true copy of the dissenting opinion by Commissioner Connole, are annexed hereto as Exhibit A.

The proceeding arose under the certification provisions of Section 7(c) and (e) of the Natural Gas Act, 15 U. S. C. A., §717f(c) and (e).

(a) The CATCO applications.

By applications filed during the first half of September 1956, Continental Oil Company, The Atlantic Refining Company, Cities Service Production Company and Tidewater [fol. 480] Oil Company (hereinafter called "CATCO applicants") applied for certificates of public convenience and necessity pursuant to Section 7(c) of the Natural Gas Act, 15 U. S. C. A., §717f(c) for the sale of natural gas from leases in the Gulf of Mexico, offshore the coast of Cameron and Vermilion Parishes, Louisiana, to Tennessee Gas Transmission Company (hereinafter called "Tennessee"), pursuant to contracts dated during August, 1956 between each seller and Tennessee.

The CATCO applicants are extensively engaged in the production of natural gas in and offshore the coast of the State of Louisiana. Tennessee is a gas transmission company engaged in the transportation and sale for resale in interstate commerce of gas from the southwestern area of the United States to the northeastern states. It is an important supplier of natural gas to distributors in New York State, through sales directly to some and indirectly to others.

The sales contracts for which approval was sought are identical in all material respects, each containing provision for daily delivery of 240,000 Mcf of gas for the first year at an initial price of 22.4¢ per Mcf (including 1¢ tax reimbursement) and providing for periodic, automatic increases in price of 2¢ every four years thereafter, reaching a terminal price of 35.4¢ per Mcf in 1986. On information and belief, the proposed initial contract price was higher, and the proposed periodic price increases were steeper than those of any previously certificated sale by a producer to a pipeline company in the southwest. The initial contract price is 4.4¢ per Mcf higher than the highest price hitherto paid by Tennessee. The contracts, as approved, would involve annual payments by Tennessee to the four applicants of $20,000,000.

(b) The Tennessee application.

Concurrently, by application dated September 19, 1956, Tennessee also applied for a certificate of public convenience and necessity pursuant to Section 7(c) of the Natural Gas Act, 15 U. S. C. A., §717f(c) for authority to institute [fol. 481] a construction program for the expansion of its system. The amount required for the construction of facilities to bring the CATCO gas, located offshore continental United States, to dry land is alleged to be $16,315,412. By order issued March 8, 1957, respondent Federal Power Commission denied petitioner's motion to consolidate Tennessee's certificate application with the previously consolidated, related CATCO certificate applications.

(c) The hearings.

Pursuant to a notice issued February 8, 1957, hearing on the CATCO applications was held February 28, 1957 and concluded the following day. Intervention by petitioner was acknowledged, and intervention by Tennessee and four distributing company customers of Tennessee (Brooklyn Union Gas Company, Long Island Lighting Company, Public Service Electric & Gas Company, and Lake Shore Pipeline Company) was permitted by order of the respondent Federal Power Commission issued February 27, 1957. Of

the six interveners, only Tennessee participated actively and affirmatively in support of the applications as filed.

(d) The decision of the Presiding Examiner.

The intermediate decision of the Presiding Examiner was issued March 29, 1957, a true copy of which is annexed hereto as Exhibit B. The Examiner refused petitioner's request, contained in its initial and reply briefs, that the issuance of certificates of public convenience and necessity be conditioned upon amendment of the contracts to provide for lower initial prices and more gradual periodic increases, and recommended issuance of permanent certificates substantially as requested in the CATCO applications. Petitioner promptly filed exceptions to the intermediate decision of the Presiding Examiner.

(e) The Commission Order of April 22, 1957.

In its "Findings and Order Issuing Temporary Certificates of Public Convenience and Necessity", issued April [fol. 482] 22, 1957, a true copy of which is annexed hereto as Exhibit C, respondent Federal Power Commission adopted the Presiding Examiner's findings as to the CATCO applicants' ability and willingness to deliver gas and as to Tennessee's need to acquire gas, but found insufficient evidence in the record on which to base a finding that public convenience and necessity required the sale at the proposed initial price. In keeping with its precedent established in *Cities Service Gas Co., Signal Oil and Gas Co.*, 14 F. P. C. , Op. No. 288, Nos. G-2569, G-2570, November 28, 1955, affirmed as *Signal Oil and Gas Co.* v. *F.P. C.*, 3rd Cir., 238 F. 2d 771, cert. den. 353 U. S. 923, respondent authorized the issuance of temporary certificates of public convenience and necessity and remanded the proceeding to the Presiding Examiner to determine at what rate public convenience and necessity required the sale. It also granted applicants' and Tennessee's request for the issuance of a temporary certificate to Tennessee for the construction of facilities to bring the gas from the offshore location to dry land.

(f) The CATCO motion for modification.

On May 6, 1957, the CATCO applicants filed an application for rehearing, notifying respondent that they would refuse to accept temporary certificates on the terms and conditions set forth in respondent's April 22 order, and offering certain immaterial and valueless modifications of the original contracts in exchange for permanent and unconditional certificates. Said application was supported by Tennessee and opposed by petitioner.

(g) The Commission order of May 20, 1957.

In its "Findings and Order Issuing Permanent Certificates of Public Convenience and Necessity and Modifying Previous Order", issued May 20, 1957, a true copy of which is annexed hereto as Exhibit D, respondent accepted the CATCO applicants' proposed modifications and authorized the issuance of permanent certificates as requested. [fol. 483] Reiterating its conclusion as to the insufficiency of the evidence to support a finding that public convenience and necessity required the sale at the proposed rate, respondent imposed the following conditions:

> 1. That the CATCO applicants and Tennessee amend the contracts to provide for an initial price of 18¢ per Mcf (including 1¢ tax reimbursement); and
>
> 2. That the contracts be further amended to permit the CATCO applicants to file for a rate increase up to 22.4¢ per Mcf, said increased price to become effective one day after the commencement of deliveries—with explicit "assurances" by the Commission to the producer-sellers that the Commission would, at that point, limit the exercise of its powers of rate suspension (Section 4 of the Natural Gas Act, 15 U. S. C. A. §717c) to a maximum period of 24 hours.

The effect of the May 20 order would have been to permit the CATCO applicants to collect the originally proposed contract price of 22.4¢ per Mcf, but to require them to demonstrate that said price was just and reasonable, pursuant to the provisions of Section 4 of the Natural

Gas Act or, failing that, to refund any amounts collected in excess of 18¢ per Mcf.

(h) The Tennessee application for rehearing.

On June 3, 1957, Tennessee, but not the CATCO applicants, filed an application for rehearing and reconsideration of respondent's May 20 order. Therein Tennessee notified respondent that the CATCO applicants would refuse to accept the permanent certificates under the conditions prescribed in respondent's May 20 order.

Pursuant to its order of June 6, 1957 granting rehearing, respondent heard oral argument on June 12, 1957. Petitioner appeared in support of either respondent's April 22 or its May 20 order.

[fol. 484] (i) The Commission's order of June 24, 1957.

Thereafter, on June 24, 1957, the order complained of herein (Exhibit A) was issued, on the decision of three Commissioners (Commissioner Stueck, Acting Chairman, Commissioners Digby and Kline), Commissioner Connole vigorously dissenting.

Thereafter, on July 23, 1957, petitioner applied for rehearing of respondent's June 24 order. A true copy of the application is annexed hereto as Exhibit E. The latter application was denied by an order issued August 15, 1957, a true copy of which is annexed hereto as Exhibit F.

IV.

Grounds Upon Which Relief Is Sought.

Respondent's June 24, 1957 determination and order authorizing the issuance of permanent unconditional certificates of public convenience and necessity to the CATCO applicants are contrary to law, arbitrary, capricious and invalid, in the following respects:

1. Respondent's June 24, 1957 determination and order were not supported by substantial evidence.

A. Certificates of public convenience and necessity for sales of gas by producers to interstate pipeline companies

cannot properly be issued under Section 7 of the Natural Gas Act without consideration of all aspects thereof including the price or prices at which said sales are to be made. The respondent in each of its orders, issued respectively April 22, May 20 and June 24, 1957, recognized and held that consideration of such prices was a vital element in the determination in these cases.

There was no evidence whatever in the record before the respondent that the contract prices at which the sales were proposed to be made were in the public interest; that the sales at such prices were required by public convenience and necessity; or that Tennessee or the consuming public required the proposed supply of natural gas by the CATCO [fol. 485] applicants under the prices and price conditions contained in the CATCO contracts with Tennessee.

B. The respondent's June 24, 1957 order represents a complete reversal of its previous determinations of April 22, 1957 and May 20, 1957. It was founded upon the assumptions (1) that the CATCO supply of gas was required by Tennessee and the consuming public, regardless of the price, and (2) that unless the Commission issued certificates of convenience and necessity in the form acceptable to the CATCO applicants, this supply of gas would not be made available to Tennessee and would be withdrawn from the interstate market.

There is no evidence whatever in the record before the respondent to sustain these assumptions. There is no substantial evidence that the proposed supply of gas is so essential to the needs of Tennessee and the consuming public that price considerations should be completely disregarded in the manner reflected in the June 24, 1957 order. Moreover, there is no substantial evidence in the record to sustain a conclusion that the proposed supply of gas could be used for any other purpose or would actually be withheld from Tennessee and the consuming public served by Tennessee's facilities, or from the interstate market.

2. The respondent's June 24, 1957 determination and order were arbitrary and capricious.

In its earlier orders of April 22, 1957 and May 20, 1957, the respondent specifically found that the record did not establish that the proposed sales of gas by the CATCO applicants to Tennessee at the prices and price conditions contained in such contracts, were in the public interest or required by public convenience and necessity. The June 24, 1957 determination and order were made upon the identical record, without additional testimony or evidence of any kind. Yet the findings therein contained were diametrically the opposite. The only new factor involved in the final determination and the sole inspiration therefor was the threat by the CATCO applicants to withdraw from [fol. 486] their contracts with Tennessee and to withhold their gas from the interstate market.

The record before the respondent did not justify the reversal of its previous orders upon the basis of such a threat. The abject submission of the respondent to that threat, in complete negation of its statutory responsibilities under the Natural Gas Act to protect the consumer interests, was unlawful, arbitrary and capricious.

V.

Relief Prayed.

Petitioner prays:

1. That a certified copy hereof be forthwith served according to law upon a member of the Federal Power Commission and that the Federal Power Commission be required in conformity with law to certify to and file with this Court a transcript of the record in the proceeding entitled *"In the Matters of Continental Oil Company, et al.,* Docket Nos. G-11024, *et al.,"* wherein the order complained of was entered.

2. That said proceeding and the decision and order issued therein on June 24, 1957 be reviewed by this Court; that said order be set aside, vacated and annulled in its entirety and the proceeding be remanded to the respondent Federal Power Commission.

3. That this Court exercise its jurisdiction and grant to petitioner such other and further relief in the premises

as the rights and equities of the cause may require and as may seem just and reasonable to this Court.

Respectfully submitted,

Public Service Commission of the State of New York,
By /s/ Kent H. Brown, Counsel.

October 7, 1957.

[fol. 487] *Duly sworn to by Kent H. Brown, jurat omitted in printing.*

[fol. 488]

EXHIBIT A TO PETITION

Order, Upon Application for Rehearing, Adopting Initial Decision of Presiding Examiner with Modifications and Conditions.

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: FREDERICK STUECK, Acting Chairman; SEABORN L. DIGBY, WILLIAM R. CONNOLE and ARTHUR KLINE.

IN THE MATTERS OF CONTINENTAL OIL COMPANY THE ATLANTIC REFINING COMPANY CITIES SERVICE PRODUCTION COMPANY TIDEWATER OIL COMPANY	Docket No. G-11024 Docket No. G-11034 Docket No. G-11046 Docket No. G-11049

(Issued June 24, 1957)

On June 4, 1957, Tennessee Gas Transmission Company (Tennessee Gas) filed an application for rehearing and reconsideration of the Commission's order issued in these

proceedings on May 20, 1957. By order issued June 6, 1957, we granted rehearing and in such order provided for oral argument "upon the contentions made and issues presented by the application for rehearing, the motion for modification and the answers thereto heretofore filed in these proceedings."[1]

[fol. 489] Pursuant to the order granting rehearing we heard oral argument on June 12, 1957.

The Commission's order issued May 20, 1957, modified an earlier order issued April 22, 1957, granting temporary certificates of public convenience and necessity to CATCO and to Tennessee Gas in Docket No. G-11107.

The temporary certificates issued by our order of April 22, 1957, authorized CATCO to sell natural gas to Tennessee Gas from CATCO's leases in the East Cameron, West Cameron and Vermilion areas off the coast of Louisiana in the Gulf of Mexico, and authorized Tennessee Gas to construct and operate approximately 107 miles of pipeline from the off-shore platforms of CATCO to a point on its main system of Kinder, Louisiana.

The contracts for the sale of gas executed between each of the CATCO companies and Tennessee Gas which are exhibits in these proceedings provide for an initial price of 21.4 cents per Mcf[2] and for a definitely fixed price escalation of two cents per Mcf every four years.

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[1] On May 6, 1957, Continental Oil Company, The Atlantic Refining Company, Cities Service Production Company and Tidewater Oil Company (collectively referred to as CATCO) filed a motion for modification of the Commission's order issued April 22, 1957, granting temporary certificates of public convenience and necessity to CATCO and Tennessee Gas and directing that the proceedings "be remanded to the presiding examiner to determine at what rate the public convenience and necessity requires the sale of natural gas by CATCO to Tennessee Gas to be made if these CATCO companies are granted permanent certificates of public convenience and necessity." Answers to the motion were filed by New York Public Service Commission, Lake Shore Pipe Line Company, Brooklyn Union Gas Company and Long Island Lighting Company (jointly), and Public Service Electric and Gas Company (collectively referred to as Intervenors) opposing the motion. Tennessee Gas filed an answer supporting the motion.

[2] Reimbursement for the one-cent Louisiana gathering tax would be added to this amount.

As has been indicated hereinbefore, the CATCO companies filed a motion for modification of the Commission's order issued April 22, 1957. In the motion the CATCO companies indicated that they were unwilling to accept temporary certificates of public convenience and necessity under the conditions specified in the Commission's order. They, however, proposed that the Commission issue permanent certificates permitting them to charge the initial agreed-upon price of 21.4 cents per Mcf, but agreed to modify therein respective contracts for the sale of natural gas to Tennessee Gas in such manner that the future price escalations contained in the contracts would remain subject [fol. 490] to the Commission's scrutiny and jurisdiction in the event that the Harris Bill, H.R. 6790, 85th Cong., were enacted into law. The proposed contract amendments would provide that if the Harris Bill were enacted, the price for gas would escalate up to the then current reasonable market price but not more than two cents per Mcf every four years.

In response to the motion we issued our May 20, 1957, order in which we granted permanent certificates of public convenience and necessity to the CATCO companies on condition that the contracts between the CATCO companies and Tennessee Gas be amended so as to provide for an initial price of 17 cents per Mcf, with provision for filing a request for an increase in such price to 21.4 cents per Mcf one day after the initial price became effective. Under the condition provision was also made for the incorporation in such contract of indefinite price escalations, with a ceiling increasing by two cents every four years.

In its application for rehearing filed June 4, 1957, Tennessee Gas has stated that it had been advised that the CATCO companies were unwilling to accept the permanent certificates of public convenience and necessity granted by the May 20, 1957, order because they objected to the pricing and other conditions specified in the order, and that they would terminate the contracts so that the large supply of gas contained in the off-shore reserves of the CATCO companies would not become available to the customers of Tennessee Gas. At the oral argument it became apparent that the CATCO companies objected to the 17-cent initial

price set in the May 20, 1957, order. On the other hand, the CATCO companies indicated that they would still be willing to amend their contracts as proposed in their motion of May 6, 1957. They indicated further that if they failed to obtain certificates without price conditions which they considered objectionable, they would seek to dispose of their gas elsewhere than to Tennessee Gas and the interstate market.

In the present status of the case we are left with the difficult problem of how to assure the delivery of this gas to the large market served by Tennessee Gas, and at the [fol. 491] same time protect the consumers from an unreasonably high price. In reaching a solution to this problem we are moved by the primary consideration that the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas. Further, it appears to us, important as is the issue of price, that as far as the public is concerned, the precise charge that is made initially is less important than the assurance of this great supply of gas. In view of these circumstances and the fact that the record does not show that the 21.4-cent rate is necessarily excessive, we agree with the presiding examiner that this certificate proceeding under Section 7 of the Natural Gas Act should not assume the character of a rate proceeding under Section 5(a). We are of the opinion that, in the circumstances of this case, in view of the great demand for gas by customers of Tennessee Gas, the price consideration should not be made the prime determinant of what the public convenience and necessity require. By virtue of the authority conferred upon us by Sections 4 and 5 of the Natural Gas Act and the proposal to modify the contracts made by the CATCO companies, we are of the opinion that we will be able to adequately protect the public interest with respect to the matter of price. In order, therefore, to insure that deliveries of gas by the four CATCO companies to Tennessee Gas will commence as promptly as possible, we will grant permanent certificates to them by this order without any condition affecting the initial price of 21.4 cents per Mcf.

However, because the 21.4-cent price, as we have heretofore observed, is higher than Tennessee Gas is paying

under any other contract, it should be subject to prompt investigation under Section 5(a) as to its reasonableness. In this connection, we may note that when three of the CATCO companies, Continental Oil, Atlantic Refining and Tidewater Oil file their contracts with Tennessee Gas as rate schedules as required by the Natural Gas Act and our Regulations, such contracts will be subject to rate investigations now outstanding against these companies. Thus, by our order issued January 27, 1956, in Docket Nos. G-9283 [fol. 492] and G-9284, we instituted an investigation of any of the rates or charges of Atlantic Refining and Tidewater Oil with respect to any transportation or sale of natural gas subject to our jurisdiction, and by our order issued the same day in Docket No. G-9279, we instituted a similar investigation of the rates and charges of Continental Oil. Concurrently with this order we are instituting in Docket No. G-12780 an investigation of the rates and charges of Cities Service. By this means relief can be afforded to the consuming public if it should be found that the 21.4-cent initial rate to be charged for the off-shore gas is excessive.

It appears to be true that if the Harris Bill, H. R. 6790, 85th Congress, or some bill similar to it, becomes law that we may lose continuing supervision over the future increased prices provided in the several contracts between the CATCO companies and Tennessee Gas. Therefore, we shall adopt the proposal of the companies made in their motion for modification of May 6, 1957, that they amend their contracts so that the price increases will remain subject to our control by using "indefinite pricing clauses" rather than "definite pricing clauses" within the meaning of the Harris Bill. They propose to do this, as indicated above, by providing that the initial sales price shall be 21.4 cents per Mcf until November 1, 1962, as at present, but after that the "reasonable market price" within the meaning of the bill and as determined by this Commission shall prevail. Adjustments would be initiated by the sellers at four-year intervals but would be limited by the step increases now provided in the contracts. The CATCO companies state that Tennessee Gas is agreeable to this arrangement and will enter into such an amendment with each of the CATCO companies.

The Commission finds:

(1) It is necessary and appropriate in the public interest to adopt the initial decision of the presiding examiner with modifications and conditions and to modify the Commission's order issued May 20, 1957, in the above-entitled proceedings, in the manner set forth below.

[fol. 493] (2) The CATCO companies are able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Natural Gas Act, and the requirements, rules, and regulations of the Commission thereunder.

(3) The sales of natural gas by the CATCO companies to Tennessee Gas, as referred to above, together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, are required by the public convenience and necessity, and permanent certificates therefor should be issued as hereinafter ordered and conditioned.

The Commission orders:

(A) Permanent certificates of public convenience and necessity are hereby issued to the CATCO companies, without further hearing, authorizing the sale of natural gas to Tennessee Gas, from CATCO's leases in the East Cameron, West Cameron and Vermilion areas off the coast of Louisiana in the Gulf of Mexico, together with the construction and operation of any facilities, subject to the jurisdiction of the Commission, used for such sale, as hereinbefore described and as more fully described in the applications in this proceeding.

(B) Each of the CATCO companies, within 20 days after the issuance of this order, shall file with the Commission a duly executed amendment to the contract submitted as an exhibit to its certificate application providing for sale of natural gas to Tennessee Gas embodying the following language:

> If and in the event that H. R. 6790 or any substantially similar legislation is enacted into law by the 85th

Congress, and becomes effective, then the provisions of Section 10, *Prices*, commencing with the portion thereof reading

[fol. 494] "From the date of initial delivery or November 1, 1957, whichever occurs first, until November 1, 1962..... 21.4 Cents per MCF"

to and including that portion thereof reading

"From November 1, 1986 to expiration of this contract.... 35.4 Cents per MCF"

is hereby deleted, and the following is substituted in lieu thereof:

From the date of initial delivery or November 1, 1957, whichever occurs first, and thereafter ..... 21.4 Cents per MCF

Provided that, After November 1, 1962, Seller shall be entitled to receive and Buyer shall pay the reasonable market price, if higher than 21.4 cents per Mcf, for the gas at the points of delivery within the limitations and subject to the terms and conditions as hereinafter set forth. Such reasonable market price shall be that as fixed by the Federal Power Commission under applicable law, after initial determination thereof by Seller as herein provided. If Seller should determine that the reasonable market price for the gas at the points of delivery for any of the 4-year periods hereinafter listed would be in excess of the price then being paid hereunder, Seller may notify Buyer, not less than eight months prior to the commencement of such period, of the price to be paid by Buyer hereunder during such period and until a subsequent determination by Seller in accordance herewith is made effective. Any price so determined and fixed shall not be less than 21.4¢ per Mcf and not more than:

23.4 Cents per MCF..... From November 1, 1962 to November 1, 1966

25.4 Cents per MCF..... From November 1, 1966 to November 1, 1970

[fol. 495] 27.4 Cents per MCF..... From November 1, 1970 to November 1, 1974

29.4 Cents per MCF..... From November 1, 1974 to November 1, 1978;

and, in the event the term of this contract is extended hereunder beyond November 1, 1978, then not more than

31.4 Cents per MCF..... From November 1, 1978 to November 1, 1982

33.4 Cents per MCF..... From November 1, 1982 to November 1, 1986.

35.4 Cents per MCF..... From November 1, 1986 to the expiration of this contract.

Except as altered hereinabove, the provisions of Section 10, *Prices*, shall remain unaffected and in full force and effect.

(C) The certificates issued herein shall be accepted in writing and under oath by each of the CATCO parties, each of whom shall be authorized to commence service upon acceptance and upon completion of construction of the "offshore facilities" by Tennessee Gas. Each acceptance shall be accompanied by a resolution of the Board of Directors of the accepting company duly authenticated indicating the approval of the acceptance of the certificates hereby granted.

(D) The certificates issued herein are not transferable and shall be effective only so long as each CATCO company continues the acts or operations hereby authorized in accordance with the provisions of the Natural Gas Act, and the applicable rules, regulations and orders of the Commission.

(E) The grant of the certificates herein shall not be construed as a waiver of the requirements of Section 4 of the Natural Gas Act, or of Part 154 of the Commission's [fol. 496] Rules and Regulations thereunder requiring the filing of rate schedules for the services herein authorized; and is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against the CATCO companies. Further, our action in this proceeding shall not foreclose nor prejudice any future proceedings or objection relating to the operation of any price or related provision in the gas purchase contracts herein involved.

(F) The findings of fact and the conclusions of the presiding examiner are hereby adopted except where inconsistent with this order.

(G) Our order issued May 20, 1957, is hereby modified to the extent that it is inconsistent with this order.

By the Commission. Commissioner Connole dissenting.

JOSEPH H. GUTRIDE,
Secretary.

IN THE MATTERS *of* CONTINENTAL OIL COMPANY, *et al.*	Docket No. G-11,024 *et al.*

(Issued June 24, 1957)

CONNOLE, Commissioner, *dissenting*:

The manifest unwillingness of the producers here involved to submit to properly constituted public authority the prices at which they propose to make these significant sales in interstate commerce has precipitated a crisis for

consumers and Commission far out of proportion to the [fol. 497] importance of the immediate proceeding. The depth of the crisis was well expressed at the oral argument of June 12, 1957. Producers represented that unless we abandoned our position in this matter it would be their decision to withdraw this gas from the interstate market. Representatives of consuming interests and of metropolitan distributing companies contended it would be preferable to risk curtailment of expansion and, by necessary implication, certainty of supply rather than to permit the Commission to depart from the position taken in our prior Orders in this docket.

This proceeding is another example of the manner in which the skyrocketing demand for natural gas is severely straining the industry's price structure. Demand threatens to elevate price levels beyond customer tolerance. As a result each proposed sale at new high price levels must be evaluated with particular care. Avoiding the disastrous consequences of a collision between consumers' needs for additional gas and producers' demands for additional compensation is particularly difficult in this proceeding because producers have presented the Commission with an almost classic Hobson's choice. In addition, the issues have become expanded in scope and effect until far more than the initial price level of this particular sale is involved. As I see it, the validity of the Commissioner's judicially approved right to attach a rate condition to certificates of public convenience and necessity when it is called for, and in fact, the very inviolability of all Commission orders is at issue here.

It is clear from the history of this proceeding that we have made unprecedented efforts to ensure fair treatment, that we have clearly evidenced our intention to cooperate in arriving at an initial price level that would be just and reasonable to all parties affected. Despite these efforts, however, the producers remain adamant. Despite ample administrative and judicial authority to the contrary[1] they

[1] See *Cities Service Gas Co., Signal Oil and Gas Co.*, 14 F. P. C. Opinion No. 288, Nos. G-2569, G-2570, November 28, 1955, affirmed as *Signal Oil and Gas Co.* v. *F. P. C.*, 238 F. 2d 771 (CA3), *certiorari* denied 353 U. S. 923.

[fol. 498] insist that a proposal to make a sale of natural gas in interstate commerce is not subject to regulatory review to determine if the public interest requires that it be made at the prices proposed.

The record is plain that the controlling reason the parties refuse to submit their contracts to regulatory review in the manner found to be necessary in the public interest is their preference for a proceeding in which the burden would be on the Commission to establish that the rate was more than reasonable. They flatly refuse to submit to one in which the parties would be required to show only that the rate was required by the public convenience and necessity. No citation of authority or reference to regulatory theory is needed to demonstrate that the burden of showing the public convenience and necessity requires a proposed service at a particular price level is on the party seeking to take advantage of the proposed service and not on the tribunal before which the case is to be made. Under the unique conditions found here, the critical importance of that decision is indisputable.

So much has been said in other forums, so many and so unanimous are the authorities in support of it, that to argue the validity and equity of the procedure contemplated by our prior Orders and supported by the *Signal Oil* case, *supra*, would serve no useful purpose now. At this tardy date the unbeliever needs inspiration, not persuasion, if the veil of obstinacy is to be removed from his eyes.

Of more immediate consequence, however, is the dilemma into which the refusal has placed this Commission and the consumers whose interest we must protect: Denial of essential supplies on the one hand, and on the other, inadequate protection against unjust and unreasonable rates.

It contributes nothing to argue that the issue here is sanctity of contract. When it applies, no one feels the force of that argument more keenly than I. And when it was threatened, I spoke out against it. For example, see my separate statement *In the Matters of American Louisiana Pipe Line Company, et al.*, G-10396, *et al.*, issued January 11, 1957.

[fol. 499] But no contract terms are involved here. No party questions the manner in which the other has carried out its part of a bargain. If anything, an essential party to the contracts has been crowded out of the bargaining table. And rather than to permit the public interest a place, the bargainers would turn the table upside down and walk away from the entire proceeding.

Plain facts are that the gas has been placed on the interstate market on one set of terms and one only. This Commission and the consumers who have made irrecoverable investments in order to use it, are given no choice but to accept. The arbitrary nature of this position appears from an examination of the orders which have been rejected by the producers.

No voice has been raised to dispute the facts that were set out so clearly in our Order of April 22, 1957. To my legal understanding, they are still facts. A few sentences will illustrate (pg. 2, mimeo):

> "The record contains insufficient evidence or testimony however, on which to base a finding that public convenience and necessity requires the sale of these volumes of gas at the particular rate level here proposed. The importance of this issue in certificating this sale cannot easily be over-emphasized. This is the largest reserve ever committed to one sale. This is the first sale from the newly developed offshore fields from which large proportions of future gas supplies will be taken. This is the highest price level at which the sale of gas to Tennessee Gas has been proposed.
>
> "These factors make it abundantly evident that, in the public interest, this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest. . . ."

No effective objection has been made to our Order of May 20, 1957. The upper limit of the price range used by the Commission in that Order was set by the contracts themselves which the record discloses contain the highest [fol. 500] of at least four bid prices. The lower limit was urged by disinterested public authority intervenors and

supported by evidence of record showing, among other things, that it was the highest price presently being paid by Tennessee Gas for the purchase of any gas produced in the Southwest area. Effectively, the Order provided a floor which the rates would not penetrate, an assurance notably lacking in the Section 5(a) procedure so zealously embraced by the applicants. And still the refusal persists.

Nothing but threats by the producers supports the proposition that this gas would be barred forever from the interstate market. And the very quantity of offshore gas affected by this decision makes it clear that the only practical market for gas of this kind for years to come is to the large consuming areas served by the long haul interstate pipelines. In my judgment the pricing pattern should not be set for so crucial a supply source in an atmosphere charged with urgency and in response to arguments whose primary motivation is private, not public, gain. The election by the producers to reject their public responsibility and insist on exercising the full strength of their bargaining position has altered completely the impact of logical and equitable arguments.

The decision of the majority is justifiable only by the evil consequences of the loss of these reserves to the particular pipeline which is a party to the contracts. Such evils would, in the opinion of the majority, exceed the gain to follow from the proof that the public convenience and necessity does not require the sale of this gas at proposed rates.

In my opinion, the consequences of abandoning our position will be more serious than their effect on this particular sale. Whether by design or accident, the issues in this proceeding now transcend the close limits of the original hearing. At stake is the question whether the Commission should hold a position which it has determined is in the long run public interest, or whether it should abandon it when confronted with allegations that short run injury to one segment of the industry and consumers [fol. 501] might result. Where the issue is reduced to this simple statement, the answer is clear.

Majority quite properly are concerned that persisting in either our April 22 or May 20 Order will result in

cancellation of the CATCO-Tennessee contracts. I agree it probably would. And quite understandably the majority refuses to permit a few distributing companies and one Public Service Commission to dictate the interests of all other consumers on Tennessee's lines. Unfortunately, however, there is more to this issue.

As concerned as I am for Tennessee's customers, I am more concerned for the whole body of consumers on *all* transmission pipe lines for whose protection we are responsible. And as deserving of preservation as I believe those particular Orders to be, I believe the principle that Federal regulatory Orders should not be changed by threats of abandoning public responsibility is even more important.

On balance, and in view of the expansion of the issues beyond those originally contemplated by this docket, I believe it more important to the public interest to preserve the Commission's authority to make lawful and necessary orders than it is to preserve these contracts as written. The right to maintain valid orders against allegations of urgency, the importance to the consumer of the *Signal Oil* doctrine, and the right of *all* consumers for protection against unreasonable initial rates outweigh the potential damage to the consumers of Tennessee Gas Transmission which might flow from maintaining the position I urge here.

While dissenting may appear to serve no useful purpose, the damage to consumer and to the public interest, to the regulatory process, and to the future of the interstate natural gas business as it is given me to discern it, would be such under the majority decision that, inevitable as that decision may appear to be, I am left no choice but to protest it by filing a dissenting vote.

I dissent from the action of the majority in this cause.

WILLIAM R. CONNOLE,
Commissioner

[fol. 502]

EXHIBIT B TO PETITION

Decision.

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

IN THE MATTERS OF CONTINENTAL OIL COMPANY THE ATLANTIC REFINING COMPANY CITIES SERVICE PRODUCTION COMPANY TIDEWATER OIL COMPANY	Docket No. G-11024 Docket No. G-11034 Docket No. G-11046 Docket No. G-11049

Upon Applications for Certificates of Public Convenience and Necessity, Filed Pursuant to Section 7(c) of the Natural Gas Act.

Appearances

For Continental Oil Company:
ROLAND B. VOIGHT, Esq., Houston, Texas.

For The Atlantic Refining Company:
BERNARD A. FOSTER, JR., Esq., Washington, D. C.
EDWARD J. KREMER, JR., Esq., Dallas, Texas.

For Tidewater Oil Company:
GENE M. WOODFIN, Esq., Houston, Texas.
ROBERT O. KOCH, Esq., Houston, Texas.

For the Tennessee Gas Transmission Company:
HARRY B. LITTMAN, Esq., Washington, D. C.
JACK WERNER, Esq., Washington, D. C.

For The Brooklyn Union Gas Company:
EDWIN F. RUSSELL, Esq., Brooklyn, N. Y.
ROBERT B. LISLE, Esq., Brooklyn, N. Y.

[fol. 503] For Cities Service Production Company:
BERNARD A. FOSTER, JR., Esq., Washington, D. C.
CECIL C. CAMMACK, Bartlesville, Oklahoma.

For Long Island Lighting Company:
EDWIN F. RUSSELL, Esq., Brooklyn, N. Y.
ROBERT B. LISLE, Esq., Brooklyn, N. Y.
DAVID K. KADANE, Esq., Mineola, N. Y.
EDWARD M. BARRETT, Esq., Mineola, N. Y.

For Lake Shore Pipe Line Company:
THOMAS F. RYAN, JR., Esq., Washington, D. C.

For Public Service Electric and Gas Company:
EDWARD S. KIRBY, Esq., Newark, N. J.
J. HARRY MULHERN, Esq., Newark, N. J.
WILLIAM R. DUFF, Esq., Washington, D. C.

For New York Public Service Commission:
MORTON L. SIMONS, Esq., New York, N. Y.
KENT H. BROWN, Esq., Albany, N. Y.

For Staff of the Federal Power Commission:
JOHN PAUL GENEAU, Esq., Washington, D. C.
ROBERT L. RUSSELL, Esq., Washington, D. C.

SIMPSON, Presiding Examiner: The proceeding arises under the certificate provisions of Section 7(c) of the Natural Gas Act (Act).

By separate applications filed in each of the dockets appearing in the caption, above, September 5, 1956, September 7, 1956, September 10, 1956 (latter two dockets), respectively; Continental Oil Company (Continental), The Atlantic Refining Company (Atlantic), Cities Service Production Company (Cities), and Tidewater Oil Company (Tidewater) applied for statutory authorization to sell natural gas from leases in the West Cameron, East Cameron and Vermilion areas, in the Gulf of Mexico, offshore the coast of Cameron and Vermilion parishes, Louisiana, to Tennessee Gas Transmission Company (Tennessee) [fol. 504] pursuant to separate contracts between each one of them and Tennessee, dated, respectively, August 17, 1956 (Continental-Tennessee contract), August 10, 1956

(Atlantic-Tennessee contract), August 14, 1956 (Cities-Tennessee contract, and Tidewater-Tennessee contract).

On October 3, 1956, the Secretary duly issued a "Notice of Applications" pertaining to the above filings, which directed that these related matters should be heard on a consolidated record, and on February 8, 1957, issued a "Notice of Hearing". Pursuant to these notices and upon appropriate publication and service thereof the hearing thus provided was duly held, commencing February 28, 1957, and concluding the following day, concerning the matters involved and the issues presented by these applications.

By order issued February 27, 1957, the Commission permitted intervention by the petitioners Tennessee Gas Transmission Company (Tennessee), The Brooklyn Union Gas Company (Brooklyn), Long Island Lighting Company (Long Island), Public Service Electric and Gas Company (Public Service), Lake Shore Pipe Line Company (Lake Shore), and permitted late filing by the New York Public Service Commission (New York) of the latter's notice of intervention received by the Commission October 22, 1956. All of the interveners actively participated in the proceedings, some throughout the hearing, until the conclusion thereof on the second day. Initial and reply briefs have been filed by or on behalf of all participants, including Applicants' interveners, and the Commission's staff.[1]

By order issued March 8, 1957, the Commission denied a motion made by Applicants at the conclusion of the hearing on March 1, 1957, to omit the intermediate decision procedure.

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[1] The applicants Atlantic and Cities filed a joint initial memorandum brief, as did the applicants Continental and Tidewater. Counsel for the Public Service Commission complains in his initial brief of "the inadequate time set by the Examiner for the filing of initial briefs." As this counsel was one of those who did not attend the concluding portion of the hearing on the second day, and no one spoke for him, the Presiding Examiner was unadvised as to any further situations concerning him which might have been entitled to consideration in connection with the determination of the time for filing briefs.

[fol. 505] THE ISSUES.

The basic issues are those presented in certificate proceedings had under Section 7(c) and (e) of the Act, to-wit:

(a) Is the Applicant, each of them, duly qualified and able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder;

(b) Is, or will, the proposed service, sale, or operation required, or be required, by the present or future public convenience and necessity.

INTENTIONS.

APPLICANTS.

The applicants contend to the effect: that the record shows that based upon sizeable reserves as well as potentials, Applicants are able to perform the service proposed; that Applicants' willingness to perform is established by the consummation of the contracts of sale with Tennessee, by the prosecution of the several applications, and by the evidence of record; and that the present and future public convenience and necessity require issuance of the certificates in order that the subject reserves may be used to supply the expansion and demands of Tennessee's markets; that the initial price to be charged under the contracts will not exert a disruptive effect on other contracts, will not trigger other Tennessee contracts, and will not precipitate the filing by Tennessee for an increase in its rates.[2] Applicants aver that if they are unable to secure

[2] In contending that the determination of a just and reasonable rate is left under the Act to Section 4 and Section 5 proceedings and is not to be determined thereunder in a Section 7 proceeding, the Applicants Continental and Tidewater point out that there is now pending under the Commission order of January 27, 1956 a Section 5 (a) proceeding against Atlantic and Tidewater (G-9283 and G-9284) and the Applicant Continental, *et al.* (G-9279), with respect both to rates in effect and those proposed to be made, and further contend that the same are entitled to have their rates tested in such pending proceedings with all of the procedural

[fol. 506] certificates within the time as shown by the record to be required, they will have no alternative but to market the gas elsewhere or face the loss of their properties; and that conditioning Applicants' certificates upon the final granting of a certificate to Tennessee to construct facilities to transport the gas to shore, as proposed by Tennessee in Docket No. G-11,107 can serve no useful purpose and would in effect be the same as refusing Applicants their certificates.

As to a condition proposed by Staff counsel dealing with the transportation of liquefiable hydrocarbons by Tennessee for Applicants from offshore platforms to points on shore, the latter (Continental and Tidewater) contend that this is a matter that can properly be considered in future rate cases involving the price to be charged by Applicants under the contracts and that if it should appear at any time that the transportation arrangement imposes any burden upon Tennessee's consumers proper adjustments may then be made after a complete review of all rate factors.

INTERVENERS

Tennessee Gas Transmission Company. This intervener supports the applications for certificates and contends, in substance: that the gas reserves involved are well located in relation to Tennessee's system, affords the latter an entry into offshore areas of large gas reserves, places Tennessee in a favorable position to acquire large reserves to be developed in the future, and enables the latter to continue to meet the expanding demands of its markets; that the volumes of gas specified in the contracts can be delivered to Tennessee; that the gas to be delivered will be of high quality; that the construction by Tennessee of the facilities required to bring the gas from Applicants offshore platforms to the Tennessee's main line at Kinder, Louisiana, is feasible; that under valid assumptions the effect of the instant contracts on Tennessee's 1958 weighted

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safeguards which are attendant thereon, and that it would be contrary to the public interest to turn these certificate proceedings into rate proceedings.

[fol. 507] average cost of gas is an increase of but 0.97 cents per Mcf; that under the authority of alleged holdings of the Commission in previous cases the justness and reasonableness of prices to be paid under gas purchase contracts should not be inquired into in producer certificate cases; and that the proposed sales of the Applicants, together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, are required by the public convenience and necessity, and certificates therefor should here issue. Tennessee avers that the price provisions in the contracts involved here do not trigger any of Tennessee's existing favored nation or renegotiation clauses contained in its other gas purchase contracts, nor, as far as the evidence discloses, any such clauses contained in the contracts of any other company.

Other Interveners. In general the intervention of the intervener customers of Tennessee rests basically upon an asserted interest in the effect the prices to be paid by Tennessee for the gas proposed to be purchased herein, and the terms and conditions of the contract pertaining thereto, will have on the price charged by Tennessee for gas sold by it to interveners.[3] Considered as a group the contentions of these interveners are to the effect: that Applicants have failed to justify the proposed price of gas to Tennessee; that once the Commission certificates these Applicants and Tennessee begins taking gas from the reserves interveners will be powerless to attack the price for such gas in any future rate proceeding; that the evidence presented does not show what the effect of the purchase of gas under these four contracts will be on Tennessee's over-all cost of gas delivered into its main system ashore or on Tennessee's rates to customers; that Applicants offered no evidence to justify the proposed initial price, allegedly the highest yet known in the Southwestern United States; that the Applicants have thus failed to meet the statutory requirements [fol. 508] for the issuance of certificates under Section

[3]Brooklyn and Long Island state that neither is seeking additional quantities of firm gas from Tennessee in the latter's pending certificate proceeding (G-11,107) relating to market expansion and the use of the additional supplies of natural gas here involved.

7(c) of the Act;[4] and that, accordingly, the Commission cannot properly reach a determination that the proposed service is in the public interest and required by the public convenience and necessity. Interveners aver that the shelf-land covered by the leases is within the offshore area in dispute between the Federal Government and the State of Louisiana and depending in part upon the resolution of that controversy the leases might be bound to be within an established pricing area and would thus eventually trigger the favored nations clauses of some 20 of Tennessee's existing contracts in the Southwestern Louisiana pricing area. Interveners also contend as the evidence indicates that an extension of Tennessee's existing pipe line is required (G-11,107), to take deliveries of gas under Applicant's contracts herein the equities involved require that any certificates issued should be conditioned upon the granting of a certificate to Tennessee for the said extension (M. Br., p. 28, Brooklyn Union and Long Island; M. Br., p. 11, Public Service); and that the present or future public convenience and necessity also require the Commission to attach a rate condition to such certificates of such nature as to prevent the establishment of a new peak price of gas in the area and thus discourage the "leap-frogging" (price-wise) which will inevitably follow these transactions unless the Commission takes such action. (M. Br., Public Service, p. 20), one requesting that the condition provide a rate not to exceed the rates which Tennessee is presently paying for natural gas produced by Applicants in the so-called West Delta, Louisiana, offshore area (M. Br., p. 14, Lake Shore).

The brief of the New York Public Service Commission as to the merits follows substantially the contentions of the immediately preceding interveners. This brief also contains [fol. 509] additional and otherwise surprising matter in the

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[4] The intervener Lake Shore states that there is no question, insofar as it is concerned, as to the ability and willingness of the Applicants to perform (M. Br., p. 3). Brooklyn and Long Island emphasize the rate aspects. The intervener Public Service directly raises the issue of "able and willing properly to do the acts and to perform the service proposed" (M. Br., pp. 9-10).

nature of allegations essentially misstating the manner in which the hearing was conducted, with respect to which the appropriate reply of counsel for the Applicants Continental and Tidewater (R. Br., p. 20) and Atlantic and Cities (R. Br., pp. 2-3) and the intervener Tennessee (R. Br., p. 2, n. 2) constitute sufficient answers and a basis for giving the further consideration thereto in this decision.

STAFF COUNSEL.

Staff counsel submits that Applicants are able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules and regulations of the Commission thereunder; and that the proposed sale of natural gas by Applicants to Tennessee is or will be required by the present or future public convenience and necessity; and recommends, substantially, that Applicants be issued their certificates of public convenience and necessity.

Staff counsel contends that no question or issue of rates is involved in this proceeding, on the ground that at such time as Tennessee proposes an increase in rates or it can be shown that Applicants' rates have a consequential and material effect upon the rates of Tennessee, the question of the justness and reasonableness of Applicants' rates may be investigated and passed upon in a proper proceeding. Counsel further contends, in effect, that the question of any need for renumeration to Tennessee for the transportation by it of liquid hydrocarbons for Applicants from offshore to shore locations, should be held in abeyance until such time as Tennessee proposes to actually transport, but proposes that an order issuing the certificates contain an appropriate reservation in the premises.

DISCUSSION.

JURISDICTION.

Each Applicant concedes, in substance, that on information and belief, all or a portion of the gas to be sold by the [fol. 510] respective Applicant will be transported by Tennessee in interstate commerce for resale, for ultimate public

consumption, and such is effectually disclosed in the evidence.

Contentions by the Applicants that they are not subject to the Commission's jurisdiction are answered in the Commission's Opinion No. 284, in *Matters of Deep South Oil Company of Texas, et al.* (G-2952, etc.) and Opinion No. 285 in *Matters of Dixie Pipe Line Company, et al.* (G-2401, etc.) which require the finding and conclusion in this proceeding that the sales of natural gas proposed by Applicants will be sales in interstate commerce for resale within the jurisdiction of the Commission, and that Applicant will thereby be a "natural-gas company" within the meaning of the Act.

THE MERITS.

Continental is a major oil and gas company with substantial assets. The other three companies also are substantial operators in oil and gas. It satisfactorily appears that none of these companies own any interest in any one of the other and there is no affiliation between them.

In the event satisfactory certificates are issued within the time provided in the contracts, which are the subject of this proceeding, Continential will be ready, willing and able to perform its obligations under its contract with Tennessee and the other three applicants are likewise ready, willing and able to carry out their agreements with Tennessee.

Though these matters are testified to solely by Continental's land superintendent in charge of the latter's marine or offshore region, on the basis of advice received from others his responsibilities and duties with respect to the business of supervision and development of leases, with or without joint interests present, which are inferred to relate to such matters, and his position in the company with respect to exploration, are deemed to remove his testimony from the realm of pure or uncorroborative hearsay to that of reasonably reliable and probative evidence as to matters on which Continental relies in conducting its day to day [fol. 511] business. Further, Applicants' counsel offered to produce further witnesses as desired by cross-examining counsel, but was not requested or advised to do so.

Continental, Atlantic, Tidewater and Cities[5] each own an undivided quarter interest in the leases here subject to the contract with Tennessee. These leases are located some 15-25 miles offshore in blocks or portions of blocks and total some 95,000 acres. They embrace what appear to be three or more fields located on the Continental shelf in the Gulf of Mexico, in the so-called West Cameron, East Cameron, and Vermilion areas.

The leases were acquired from the State of Louisiana by purchase at sales conducted by the State Mineral Board at Baton Rouge, Louisiana, in 1947 to 1948, and have been continued under Section 6 of the Outer-Continental Shelflands Act. It satisfactorily appears, that in order to comply with the obligation of the leases and the Shelflands Act, production from the leases should commence by 1958.

Three of the Applicants have designated Continental as operator of the leases and Continental has created an operating organization within itself known as its CATC Marine Region which conducts the offshore activities for which it is responsible. However, each Applicant has retained to itself responsibility for marketing its own production from its lease interests.

THE CONTRACTS.

The basic terms and conditions of the contracts between each of the producer companies and Tennessee are identical. Under the terms of these contracts deliveries to Tennessee are scheduled to commence November 1, 1957. From November 1, 1957 to November 1, 1958, Tennessee will be required to take 175,000 Mcf (or four-fifths of the maximum efficient rate of flow, whichever is less). From and after November 1, 1958, Tennessee will be required to take, or pay for, 1,000 Mcf for every 8,000,000 Mcf of recoverable gas originally in place in the dedicated reserves. [fol. 512] Delivery to Tennessee will be effected by or on behalf of the Applicants at the latter's offshore drilling platforms.

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[5] Known as the CATC Group, from the initials of the names of the four companies.

The dedication under the contracts is up to a maximum of 2,000,000,000 Mcf with the right to Applicants to dedicate to the contract on or before August 1, 1957, or August 1, 1958, additional gas reserves in the areas[6] up to the amount of 1,000,000,000 Mcf[7], and, subject to several conditions, including an extension of the term of the contract, certain additional reserves may be dedicated each 12 months during the period August 1, 1958 to August 1, 1967. However, the initial dedication is not only limited to 2,000,000,000 Mcf, but is limited also by lease lines, reservoirs specified in exhibits attached to each contract, and by depth (Vermilion area only).

The gas sold to Tennessee is to be metered on the Applicants' offshore platforms and delivered at the valve on the discharge side of the meter.

FACILITIES.

Other than wells and platforms, facilities owned and operated by or on behalf of Applicants for the purpose of effecting deliveries to Tennessee will include separators and meters on the platforms. Tennessee is to provide the offshore pipeline and will be required to connect up each of Applicants' producing platforms. Applicants will not own or operate a gathering system and will own no facilities, so far as deliveries to Tennessee are concerned, beyond the platforms.[8]

Continental as operator of the leases, will be able to commence deliveries to Tennessee on November 1, 1957, as required by the contract, if Tennessee is granted the certificate applied for by the latter in Docket No. G-11107 in time to construct the facilities necessary to enable it (Tennessee) to accept such deliveries.

[fol. 513] To receive gas from nine existing platforms and deliver it to Tennessee's main line system at Kinder,

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[6] West Cameron, East Cameron, and Vermilion areas.

[7] No additional dedications have been yet effected.

[8] Because of directional drilling as a method of developing offshore reserves, Applicants may have as many as five wells drilled from one platform.

Louisiana, will require the construction by Tennessee of 46.9 miles of 26-inch line from Kinder to the shore's edge and 60.8 miles of 26-inch to 12-inch lines thence to the platforms offshore, at an estimated total cost of $16,315,412.[9]

Tennessee is seeking a certificate of public convenience and necessity for these facilities in G-11107 in connection with a proposed general expansion of its system.

Tennessee represents through the testimony of its witnesses that it is willing and able to construct these lateral facilities necessary to receive the gas here involved. It has had experience in the construction of similar offshore facilities in another location off the same coast, and there appear to be no particular technical problems to be confronted in the construction of such facilities which cannot be overcome by normal engineering practices.

However, due to late summer and and fall weather conditions usually prevailing in the Gulf, Tennessee must commence construction of the offshore gathering system not later than early spring of this year.

Failure to complete the system in time would place in jeopardy Tennessee's rights under its contracts with Applicants, and so far as the latter relied upon timely completion which failed would place in jeopardy the titles to their leases.

TENNESSEE'S REQUIREMENTS FOR ADDITIONAL GAS.

Tennessee's vice-president in charge of gas purchases, who represented Tennessee in the lengthy negotiations of the instant contracts, testified that Tennessee's purpose was to obtain gas reserves to supply the expansion of Tennessee's market as shown in Tennessee's pending application in Docket G-11107. None of the data which it is assumed was filed in support of such application is in evidence in this proceeding.

[9] In the event of dedication of additional gas reserves the contracts would require Tennessee to build as much as one mile of offshore lateral gathering line for each 10,000,000 Mcf of gas reserves added up to 100,000,000 Mcf for each of 9 years. This presents no problem here.

[fol. 514] GAS AVAILABLE.

Twenty-two wells have been drilled on the leases by the four companies,[10] nine of which are dual completions. Eleven additional wells are programmed for 1957 and there will be further development by drilling in subsequent years. There are nine platforms in place on which there is either a well drilling or one or more wells completed. Two more platforms at least are to be added after production.

Tennessee's gas reserve witness testified that he estimated that the recoverable gas reserves in the three fields under the 95,000 acres dedicated as above set forth[11] totalled some 1,673,929,000 Mcf (14.73 psia).[12] The estimates are derived by using the volumetric method as applied to information obtained from the operator, consisting of descriptions and maps of the leases, and well surveys, with electrical logs, core descriptions, and well test information.

In nearly all instances the witness made his own structural maps. He made his own determinations of average sand thickness, productive limits, porosity, and connote water, having available for these purposes his own experience and interpretative information contained in Tennessee's own files pertaining to similar fields along the Louisiana Gulf Coast area. He derived reservoir temperatures and pressures from well information and gradient curves, allowed for deviation from compressibility, and assigned recovery factors. His reserve estimates, though made independently in the manner stated, agree substantially with those of the operator. None of the gas is associated with oil and it is relatively low in condensate.

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[10] Four dry holes presumably are not included in this number.

[11] Limited by lease lines, reservoirs, and depth, *supra*. Of the 95,000 acres only 11,500 are in fact proven.

[12] Subject to some reduction if Applicants remove the condensate. The contract limits the reduction in volume for such purposes to 10%. The estimated reduction is much less than that thus allowed. Of the total proven reserve of 1,673,929,000 Mcf some 430,000,000 Mcf is untested by conventional production methods and rests on the correlation of electric well log and core analysis data.

Basing his testimony on well information and the number of wells drilled and to be drilled, Tennessee's reserve [fol. 515] witness testified in conclusion that in his opinion the volumes of gas specified by terms of the contract can be delivered to Tennessee, i.e. 175,000 Mcf per day (15.02 psia) the first year and thereafter in accordance with the reserve ratio.[13]

Tennessee's vice-president in charge of gas purchases testified that these reserves which would amount to a substantial portion of Tennessee's total reserves, not only constituted the only large package of gas for sale in the Gulf Coast area at the time of negotiations, but were well located with respect to Tennessee's system, and had a significant potential for additional reserves as the acreage is developed, in all advantages of so substantial a character as to have led most of the other interstate gas transmission companies to enter highly competitive bids for them. None of the interveners made any substantial contention that the acquisition of these reserves by Tennessee was improvident or useless or was other than favorable to the interest of the public served by Tennessee's system. In fact the only real objection by interveners to the granting of a certificate to these Applicants is to the price at which these reserves were acquired by Tennessee.

PRICES.

As previously stated herein the contracts set an initial price of 21.4¢ per Mcf (15.025 psia) applicable substantially to the period from the date of initial delivery (November 1, 1957) to November 1, 1962, and provide thereafter for step escalations, briefly at the rate of 2¢ per Mcf every four years until the expiration of the contract. The con-

[13] At the contract take or pay ratio effective after the first year (1,000 Mcf per day for each 8,000,000 Mcf of original recoverable reserves) the average minimum rate of take would become 1/8,000 of 1,673,929,000 Mcf or 209,000 Mcf (14.73 psia) per day. The contracts also provide a formula for the maximum demand which Tennessee can make upon Applicants, providing, on certain assumptions, a swing between the foregoing minimum of 209,000 Mcf and a maximum of 250,000 Mcf per day (14.73 psia).

tracts also provide for reimbursement of State production taxes or a Federal equivalent dependent upon the settlement of title to the offshore shelf lands. The production [fol. 516] or severance tax imposed by the existing laws of the State of Louisiana (Act No. 11, Laws 1948; Act No. 45, Laws 1954, amending) is 1¢ per Mcf.

Including the gas which Tennessee proposes to purchase under these contracts, some 240,000 Mcf per day (14.73 psia), it is estimated that the weighted average cost of all gas to Tennessee in 1958 will be some 13.70¢ per Mcf, as compared with 12.73¢ if the gas here proposed to be purchased is excluded.[14]

Interveners have elicited from their examination of witnesses that, among other things, in the West Delta offshore area, some 200 miles distant, Applicants are selling gas to Tennessee at 17¢ per Mcf; that Tennessee pays only slightly in excess of 10¢ per Mcf, including the gathering tax, in its Southwestern Louisiana pricing area; that Tennessee is not paying as high a price as 21.4¢ to any other producer under any contract; that the step escalation provided in the instant contracts were inserted in part at least, in lieu of favored nations and price redetermination clauses, and are the steepest of any such provisions in Tennessee's present gas purchase contracts. However, initial or other prices paid by other interstate pipelines in long term contracts in onshore areas equal or exceed 20¢ per Mcf for smaller reserves and smaller future potentials than those provided by Applicants' contracts here with Tennessee, and steep step escalations are not unknown in interstate pipeline contracts. All such matters, nevertheless, assume a basis of comparison not provided by the evidence of record in this proceeding. Varying operating conditions characterizing different transactions could be most significant. Tennessee did not initiate the foregoing price comparisons and no real effort was made by interveners to adequately support them. In any event, to permit such an exploration in this proceeding would simply invite the

[14] Neither cost figure reflects possible increases which may be filed for under the provisions of Tennessee's other contracts, whether or not these contracts with Applicants become effective.

opening up of the whole subject of the validity of all rates entering into the comparison, viz., not only the prices here immediately involved, but the rates charged in the West [fol. 517] Delta area,[15] and the others mentioned. This is more than the Act requires or intends in a Section 7 certificate proceeding, such as here, where public convenience and necessity is inherently the basic issue, certainly in the absence of any showing of imprudence or of abuse of discretion by management.

Therefore, assuming management has discretion, within its proper range, to make a selection as to sources of gas supply, and, in the absence of any substantial indication in the evidence or even serious claim by interveners that the initial cost of this gas by itself would necessarily lead to an increase in Tennessee's rates to jurisdictional customers, no grounds appear for permitting this case under Section 7 of the Act to assume the character of a rate proceeding under Section 5(a) thereof.

Any attempt to add the Mcf cost of lateral line, pipe line, or gathering facilities directly to the price of gas at the offshore platforms for the purpose of arriving at some total Mcf cost of gas to Tennessee's system would simply involve the unwarranted assumption that any other addition of reserves, in lieu of those here involved, would not likewise entail the construction of additional facilities of like nature and of substantial size and proportionate cost. Moreover, the evidence here clearly shows that single or package reserves of such size as Applicants' were not available to Tennessee from other sources in the Gulf Coast area.

Barring questions which cannot be resolved in this proceeding concerning Louisiana's title to the offshore shelf-lands and the significance of a determination of title in Louisiana as to the possible seaward extension of parish lines with respect to the territorial scope of price provisions in Tennessee's onshore contracts, the opinion of Tennessee's operating officials is that the West Cameron, East Cameron and Vermilion areas constitute new pricing

[15] The West Delta reserves are smaller than those the Applicants offer here.

areas and that the price provisions of the contracts here involved will not trigger existing favored nations or rene- [fol. 518] gotiation clauses in Tennessee's other gas purchase contracts in its Southwest Louisiana pricing area nor, in fact, so affect any of Tennessee's other gas purchase contracts, and no participant made a showing to the contrary.

THE "SUBSTITUTION" CLAUSE.

Subject to certain conditions not here pertinent, Section 3(j) of the contracts provides a substitution or permissive delivery clause whereby, in substance, each Applicant may deliver up to its 25% share of 50,000 Mcf per day in addition to the respective contract quantities if Applicants are prevented from delivering to Tennessee from their gas reserves dedicated to Tennessee in fields in the West Delta area, such additional deliveries to be made under the terms and prices of these contracts but to be allocable against Applicants' commitments to Tennessee under the West Delta contracts.

This clause was inserted at the suggestion of Tennessee, due to the fact that the gas reserves dedicated to Tennessee under the West Delta contract are so rich in distillate or condensate as to entail possible retrograde condensation in the reservoir during production. Under such circumstances a possibility exists that either State authorities might require or producers might desire to cycle the gas and recover the liquids, in which circumstances deliveries to Tennessee from that area could or would be curtailed at the time. Operations under Section 3(j), above, would assume make-up deliveries from West Delta at a later time after cycling was completed, and the overall arrangement would operate to enable Tennessee to receive its rightful quantities of gas under any circumstance, and to eventually receive under each contract all contract quantities, probably at the same ultimate resultant cost of purchase. Inequities possibly latent in such an operation cannot now be determined and are not to be considered as if presented for such determination in this proceeding. The clause is not objectionable *per se*.

[fol. 519] APPLICANTS' EXTRACTION AND TRANSPORTATION RIGHTS.

Section 6(b) of the contracts provide, in brief, that, in addition to mechanical or low temperature separation, Applicants may process the gas for the recovery of liquifiable hydrocarbons including the methane-ethane stream at a shore based extraction plant, provided that such process, together with fuel use, will not remove more than 10% of the volume of gas daily produced and delivered to Tennessee. Moreover, the gas finally delivered to Tennessee must have a total heating value of not less than 1,000 Btu per cubic feet.

Several considerations are pertinent to this matter:

In making deliveries to Tennessee at the off-shore platform Applicants must provide separators to eliminate water in order to meter and deliver dry gas. Separation also removes at least some of the condensate or distillate, which under the contracts may be recombined by Applicants with the gas stream after the gas has been metered for off-shore delivery for transportation by Tennessee to shore and delivery to Applicants without charge. Tennessee's witness testified to the effect that if the Applicants did not remove at least some of the distillate before it was pipelined, Tennessee would have to do so, and further, Tennessee will pay only for the residue gas as remetered at Applicants' onshore processing plant.

The gas is fairly normal Miocene production and is very dry, having a low distillate or condensate content varying from 6 to 11 barrels per 1,000 Mcf, and consequently small shrinkage in volume is expected, i.e., something less than 5% of ~~the stream.~~ Further the flexibility capacity-wise reflected in the design of the lateral line for normal gas operations and the infrequency with which Tennessee would be depleting the reserves here involved, at the maximum rate, make it appear that the real effect cost-wise to Tennessee of the transportation for Applicants, as well as any appropriate disposition with respect thereto, cannot now be determined. This burden will, in any event, have no im-
[fol. 520] mediate effect upon Tennessee's rates to jurisdic-

tional customers and can be further considered at such time as operations commence or rate effects become apparent.

The Relation of Tennessee's Application in Docket No. G-11,107.

The facts of this proceeding indicate that these reserves are important to Tennessee's expansion and it is known that the demand for natural gas is almost everywhere in excess of that available from pipeline systems. However, any finding to the effect the public convenience and necessity requires or will require the issuance of certificates to Applicants in this proceeding would be confronted with the fact that a contrary finding made with respect to Tennessee's application for a certificate which is pending in Docket No. G-11,107 would be in fact in conflict as Tennessee proposes to use the reserves which are the subject of this proceeding in connection with its expansion program which is the subject of its application in G-11,107.

The findings and order will therefore be qualified and conditioned upon a certificate being issued to Tennessee in G-11,107 or otherwise, covering facilities necessary to the taking of gas from Applicants into Tennessee's main line system.

Further Findings and Conclusions.

(1) Applicants, independent producers of natural gas, upon commencement of the sales authorized herein, will be engaged in the sale of natural gas in interstate commerce for resale for ultimate public consumption; subject to the jurisdiction of the Commission, and each will, therefore, be a "natural-gas company" within the meaning of the Natural Gas Act.

(2) The sales of natural gas hereinbefore described, as more fully described in the applications, will be made in interstate commerce, subject to the jurisdiction of the Commission, and such sales by Applicants, together with [fol. 521] the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(3) Applicants are able and willing properly to do the acts and to perform the services proposed and to conform to the provisions of the Natural Gas Act, and the requirements, rules and regulations of the Commission thereunder.

(4) Assuming the issuance to Tennessee by the Commission of an appropriate certificate for the construction of facilities enabling it to take delivery of Applicants gas into its (Tennessee's) main line system the sales of natural gas by Applicants, together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, are required by the public convenience and necessity, and certificates should be issued as hereinafter ordered and conditioned.

ORDER.

Upon consideration of the record herein, the contentions and briefs of counsel, and for the reasons and upon the findings and conclusions set forth in the foregoing portions of this decision, of which this order is a part,

IT IS BY THESE PRESENTS ORDERED, subject to review by the Commission on appeal, or on its own motion, as provided by its Rules of Practice and Procedure, that:

(A) That certificates of public convenience and necessity be and are hereby issued, upon the terms and conditions of this order, authorizing the sales by Applicants of natural gas in interstate commerce for resale, together with the construction and operation of any facilities, subject to the jurisdiction of the Commission, used for the sales of natural gas in interstate commerce, as hereinbefore described and as more fully described in the applications and exhibits in this proceeding.

[fol. 522] (B) That certificates issued herein shall be deemed accepted and of full force and effect, unless refused in writing and under oath by Applicants within 30 days from issuance of this order.

(C) That certificates are not transferable and shall be effective only so long as Applicants continue the acts

or operations hereby authorized in accordance with the provisions of the Natural Gas Act, and the applicable rules, regulations and orders of the Commission.

(D) That the grant of the certificates herein shall not be construed as a waiver of the requirements of Section 4 of the Natural Gas Act, or of Section 154 of the Commission's Rules and Regulations thereunder requiring the filing of rate schedules for the services herein authorized, and is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against the Applicants. Further, the action in this proceeding shall not foreclose nor prejudice any future proceedings or objection relating to the operation of any price or related provision in the gas purchase contracts herein involved.

(E) The question of such transportation and proper charge therefor not being presently before the Commission, the issuance of this order shall not be construed as recognition of any claim by Applicants of an obligation on the part of Tennessee to transport liquids for the account of Applicants.

(F) This certificate is conditioned upon the granting by the Commission of a certificate to Tennessee authorizing the construction and operation of facilities enabling Tennessee to take deliveries of gas from Applicants herein into Tennessee's main line system.

Ewing G. Simpson
Presiding Examiner

Filed: March 29, 1957

Issued: March 29, 1957

[fol. 523]

EXHIBIT C TO PETITION

Findings and Order Issuing Temporary Certificates of Public Convenience and Necessity.

(Issued April 22, 1957)

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: JEROME K. KUYKENDALL, Chairman; SEABORN L. DIGBY, WILLIAM R. CONNOLE and ARTHUR KLINE.

IN THE MATTER of	
CONTINENTAL OIL COMPANY	Docket No. G-11024
THE ATLANTIC REFINING COMPANY	Docket No. G-11034
CITIES SERVICE PRODUCTION COMPANY	Docket No. G-11046
TIDEWATER OIL COMPANY	Docket No. G-11049
TENNESSEE GAS TRANSMISSION COMPANY	Docket No. G-11107

Continental Oil Company on September 5, 1956, The Atlantic Refining Company on September 7, 1956, and Cities Service Production Company and Tidewater Oil Company on September 10, 1956 (together termed CATCO) have filed applications pursuant to Section 7 of the Natural Gas Act for a certificate of public convenience and necessity authorizing the sale of gas from their leases off the coast of Louisiana to Tennessee Gas Transmission Company. On its part, Tennessee Gas has filed an application for a certificate of public convenience and necessity on September 19, 1956, as amended March 1, 1957, for authority, among other things, to construct and operate facilities for the transportation of gas from the offshore platforms owned by CATCO to a point on its main pipeline system at Kinder, [fol. 524] Louisiana. The presiding examiner's decision issued March 29, 1957, would grant certificates to CATCO,

without imposing a rate condition but with a condition that a certificate be issued to Tennessee Gas for the necessary facilities.

Exceptions were filed by interveners New York Public Service Commission, Long Island Lighting Company, Lake Shore Pipe Line Company, and Public Service Electric and Gas Company objecting to the rate proposed and requesting a rate condition, and by CATCO, objecting to the requirement that a certificate be granted to Tennessee Gas unless a temporary certificate would satisfy this condition.

The record shows that the four producer companies each owns a quarter interest in gas leases located some 12 to 25 miles off the coast of Louisiana in the Gulf of Mexico, in the East Cameron, West Cameron, and Vermilion areas, totalling some 95,000 acres and containing reserves of some 1,673,929,000 Mcf including 430,000,000 Mcf untested by conventional methods. In this offshore field the four companies own platforms, wells, separators, and meters, but no pipelines. To connect with the offshore wells, Tennessee Gas proposes to build some 46 miles of 26-inch line from its main line at Kinder, Louisiana, to the shore, and some 61 miles of 26-inch, 20-inch, 16-inch, and 12-inch line thence to the platforms at an estimated cost of $16,315,412.

The sales of gas will be made to Tennessee Gas at the offshore platforms under the terms of separate contracts executed in August of 1956, all of whose basic provisions are identical, providing that Tennessee Gas must accept 175,000 Mcf or four-fifths of the total quantity which the wells are capable of producing, whichever is the lesser, until November 1, 1958. After that it will be required to take and pay for 1,000 Mcf for every 8,000,000 Mcf of recoverable gas originally in place in the dedicated reserves. The testimony showed that the reserves were adequate to meet contract deliveries.

The initial price which would be paid by Tennessee Gas under each of the contracts, is 22.4 cents per Mcf (including [fol. 525] one cent per Mcf for the Louisiana gathering tax) until November 1, 1962. Thereafter, the price would escalate by two cents per Mcf every four years until the contract in question expires. The record shows that the 22.4-cent

price is higher than Tennessee Gas is paying under any other contract. It is this price, with the provision for escalation, to which the interveners have made vigorous objections in exceptions to the presiding examiner's decision, which would grant a certificate without a rate condition attached to it. They contend that if the rate were allowed to stand it would establish a higher-price plateau in a new area to the detriment of consumers.

The record contains insufficient evidence or testimony, however, on which to base a finding that the public convenience and necessity requires the sale of these volumes of gas at the particular rate level here proposed. The importance of this issue in certificating this sale cannot easily be overemphasized. This is the largest reserve ever committed to one sale. This is the first sale from the newly developed offshore fields from which large proportions of future gas supplies will be taken. This is the highest price level at which the sale of gas to Tennessee Gas has been proposed.

Those factors make it abundantly evident that, in the public interest, this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest. See *Cities Service Gas Co., Signal Oil and Gas Co.*, 14 F. P. C. , opinion No. 288, Nos. G-2569, G-2570, November 28, 1955, affirmed as *Signal Oil and Gas Co.* v. *F. P. C.*, 238 F. 2d 771 (CA ?), certiorari denied, 353 U. S. 923.

The examiner has found there is a need for those volumes of gas on the system of Tennessee Gas, and that the applicants are ready and able to deliver them and take them, respectively. These findings we adopt. They argue conclusively that the sale is necessary in the public interest. All that remains for disposition is a determination as to the rate level at which the public convenience and necessity requires them to be made. Compelling reasons prevent [fol. 526] us from postponing making these volumes available, however, until such time as the determination has been made.

The contracts between CATCO and Tennessee Gas provide November 1, 1957, as the date for commencing service, and in order to comply with the leases and the Louisiana

Shelflands Act, production should commence by 1958. To meet this schedule Tennessee Gas must build its underwater pipelines before the onset of the season of bad weather. In view of this total situation we are disposed at this time to grant temporary certificates to CATCO for the sale of gas and to Tennessee Gas as requested by it for its proposed 107 miles of connecting pipelines.[1] At the same time, we shall remand the CATCO proceedings to the presiding examiner to determine at what rates the public convenience and necessity requires these sales to be made if permanent certificates are to be granted to these companies upon final disposition of their applications. By the procedures adopted here, however, we do not necessarily imply that the rates at which the proposed sales would be made are not in the public interest.

THE COMMISSION FINDS:

(1) Continental, Atlantic, Tidewater, and Cities Service, independent producers of natural gas with respect to the sales here involved, upon commencement of the sales authorized herein, will be engaged in the sale of natural gas in interstate commerce for resale for ultimate public consumption, subject to the jurisdiction of the Commission, and each will, therefore, be a "natural-gas company" within the meaning of the Natural Gas Act, if not already in this status because of other transportation or sales.

(2) The sales of natural gas by CATCO hereinbefore described, as more fully described in the applications, will be made in interstate commerce, subject to the jurisdiction [fol. 527] of the Commission, and such sales by CATCO, together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

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[1] By letter of March 29, 1957, Tennessee Gas was granted a temporary certificate for facilities covered by the same application in docket No. G-11107, but specifically excluding the 107 miles of pipeline referred to here.

(3) Tennessee Gas in engaged in the transportation of natural gas in interstate commerce and the sale of natural gas in interstate commerce for resale for ultimate public consumption subject to the jurisdiction of the Commission, and, therefore, is a "natural-gas company" within the meaning of the Natural Gas Act as heretofore found by the Commission.

(4) The facilities to be constructed by Tennessee Gas as hereinbefore described are proposed to be used in the transportation and sale of natural gas in interstate commerce, subject to the jurisdiction of the Commission, as an integral part of Tennessee Gas' existing pipeline system, and the construction and operation thereof by Tennessee Gas are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(5) To assure maintenance of adequate service and to serve Tennessee Gas and its customers, the public convenience and necessity requires that temporary certificates be issued to CATCO and Tennessee Gas as hereinafter ordered.

(6) It is necessary and appropriate in the administration of the Natural Gas Act that the proceedings in docket Nos. G-11024, G-11034, G-11046, and G-11049 be remanded to the presiding examiner to make the determination required in (D) below.

(7) To the extent that the exceptions above referred to are inconsistent with the Commission's order herein, they should be denied.

[fol. 528] THE COMMISSION ORDERS:

(A) A temporary certificate of public convenience and necessity is hereby issued to CATCO authorizing the sale of natural gas to Tennessee Gas, from CATCO's leases in the East Cameron, West Cameron and Vermilion areas off the coast of Louisiana in the Gulf of Mexico, together with the construction and operation of any facilities, subject to the jurisdiction of the Commission, used for such sale, as hereinbefore described and as more fully described in the applications in this proceeding.

(B) A temporary certificate of public convenience and necessity is hereby issued authorizing Tennessee Gas to construct and operate approximately 107 miles of pipeline to transport natural gas from the offshore platforms of CATCO to Tennessee Gas' main system at Kinder, Louisiana, as hereinbefore described and as more fully described in its application.

(C) The temporary certificates issued herein shall be without prejudice to such final disposition of the applications of CATCO and Tennessee Gas as the record may require.

(D) The proceedings in Docket Nos. G-11024, G-11034, G-11046, and G-11049 shall be remanded to the presiding examiner to determine at what rate the public convenience and necessity requires the sale of natural gas by CATCO to Tennessee Gas to be made if these CATCO companies are granted permanent certificates of public convenience and necessity.

(E) In proceedings conducted in accordance with the requirements of paragraph (D) above the burden of proof and the burden of going forward with the presentation of evidence shall be upon the applicants herein, the CATCO Companies and Tennessee Gas.

(F) The certificates of public convenience and necessity issued herein are conditioned upon the receipt by the Commission within 15 days of the issuance of this order of [fol. 529] letters signed by a duly authorized official of each of the CATCO Companies and Tennessee Gas, unconditionally accepting the temporary certificates hereby granted under the conditions herein stated.

(G) Exceptions filed with respect to the initial decision of the presiding examiner which are inconsistent with our action herein are hereby denied.

By the Commission.

JOSEPH H. GUTRIDE,
Secretary.

In the Matters of	
Continental Oil Company	Docket No. G-11024
The Atlantic Refining Company	Docket No. G-11034
Cities Service Production Company	Docket No. G-11046
Tidewater Oil Company	Docket No. G-11049
Tennessee Gas Transmission Company	Docket No. G-11107

April 22, 1957

Digby, Commissioner, concurring:

I concur completely in the issuance of temporary certificates to the producers and to Tennessee. I also concur in the order reopening and referring the record back to the Examiner to be proceeded with on the applications of the producers for permanent and final certificates of public convenience and necessity to make the sale to Tennessee. I do not believe that the Commission should presume that the final certificates, if and when issued, should be conditioned by prescribing an initial rate.

S. L. Digby, Commissioner

[fol. 530]

EXHIBIT D TO PETITION

Findings and Order Issuing Permanent Certificates of Public Convenience and Necessity and Modifying Previous Order.

(Issued May 20, 1957)

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: JEROME K. KUYKENDALL, Chairman; SEABORN L. DIGBY, FREDERICK STUECK, WILLIAM R. CONNOLE and ARTHUR KLINE.

IN THE MATTERS of	
CONTINENTAL OIL COMPANY	Docket No. G-11024
THE ATLANTIC REFINING COMPANY	Docket No. G-11034
CITIES SERVICE PRODUCTION COMPANY	Docket No. G-11046
TIDEWATER OIL COMPANY	Docket No. G-11049

On May 6, 1957, Continental Oil Company, The Atlantic Refining Company, Cities Service Production Company, and Tidewater Oil Company (together termed CATCO) filed a document entitled "Application for Rehearing" but in effect requesting modification of the Commission's order of April 22, 1957, issuing temporary certificates of public convenience and necessity to CATCO and Tennessee Gas Transmission Company in docket No. G-11107. Since the order of April 22, 1957, was not a final order and since CATCO's filing did not request a hearing, but rather modification of our order, we shall treat the filing as a motion for modification. Answers were filed on May 14, 1957, by Public Service Electric and Gas Company, and on May 16, [fol. 531] 1957, by the New York Public Service Commission, Lake Shore Pipe Line Co., Brooklyn Union Gas Company, and Long Island Lighting Company requesting that

the Commission deny CATCO's motion, and on May 16, 1957, by Tennessee Gas urging that the motion be granted.

The temporary certificates issued by our order of April 22, 1957, authorized CATCO to sell natural gas to Tennessee Gas from CATCO's leases in the East Cameron, West Cameron and Vermilion areas off the coast of Louisiana in the Gulf of Mexico, and authorized Tennessee Gas to construct and operate approximately 107 miles of pipeline from the offshore platforms of CATCO to a point on its main system at Kinder, Louisiana. The Commission remanded the proceedings to the presiding examiner to determine at what rate the sale of natural gas by CATCO to Tennessee Gas should be made if permanent certificates were to be granted.

By their filing of May 6, 1957, the CATCO companies state that the nature and extent of the economic risk which they would have to undergo is such as to foreclose their acceptance of temporary certificates. They say further that they could not present sufficient evidence at the hearing contemplated by the Commission's order within any reasonable period in the future and could not afford to commence construction until at least the initial rate question is resolved.

The CATCO companies urge that if there is no change in existing law the Commission will have continuing control, under Sections 4 and 5 of the Natural Gas Act, over the rate to be charged and any increases proposed. However, if the Harris Bill, H. R. 6790, 85th Congress, or some bill similar to it, becomes law they admit that the Commission might possibly lose continuing supervision over the future price increases provided in the several contracts between the CATCO companies and Tennessee Gas. To permit the Commission to retain such supervision the CATCO companies propose to amend their contracts so that, if the Harris Bill is enacted into law, the initial sales [fol. 532] price shall be 21.4 cents per Mcf[1] until November 1, 1962, as at present, but after that the "reasonable market price" within the meaning of the bill and as determined by

[1] Reimbursement for the one-cent Louisiana gathering tax would be in addition to this amount.

this Commission shall prevail; provided, however, that such "reasonable market price" shall be "not less than 21.4 cents per Mcf." Under this proposal, adjustments may be initiated by the sellers at four-year intervals under "indefinite pricing clauses", which would replace the "definite pricing clauses" contained in the contracts but would be limited by the step increases now provided in the contracts. Tennessee Gas states in its answer that it agrees with and fully supports CATCO's proposal and will enter into the proposed amendments to the gas sales contracts of the CATCO companies.

In view of the need for the volumes of gas and the exigencies of the construction schedule to which we adverted in our previous order, we are disposed to modify our order of April 22, 1957, and to grant a permanent certificate to CATCO conditioned upon the amendment of the contracts between them and Tennessee Gas to reflect the modifications of CATCO's proposal in this regard as hereinafter stated. However, this proposal does not go far enough, for it leaves unaffected the 21.4 cents initial sales price. As we have already stated, the record does not contain sufficient evidence on which to base a finding that the public convenience and necessity requires the sale of the gas at that particular rate level. Furthermore, under the provisions of the so-called Harris Bill, if it is enacted into law, the proposed initial price might no longer be subject to adjustment by us. At the same time we realize that any proceeding to determine the proper rate level would so delay the construction schedule as to cause possible forfeiture of the leases. To permit the CATCO companies and Tennessee Gas to proceed with their plan to make available the volume of gas contemplated to be delivered from the offshore leases and at the same time insure that the interests of consumers are protected not only as to the [fol. 533] future prices, but as to the initial price, we conclude that permanent certificates should issue to CATCO upon acceptance by it of the condition described below, without remanding the proceedings to the presiding examiner as we had provided.

The condition to the certificates shall be that each of the CATCO companies shall amend its contract with Tennessee

Gas so as to provide that the initial price shall be 18 cents per Mcf (including one cent per Mcf for the Louisiana gathering tax). This price, the record shows, is the highest price presently being paid by Tennessee Gas for the purchase of any gas produced in the Southwest area. The contracts shall be further amended to provide that the CATCO companies shall be entitled to file for an increased rate to be effective one day after commencement of deliveries to Tennessee Gas, but such increased rate shall not be in excess of 22.4 cents per Mcf (inclusive of the one-cent Louisiana gathering tax). The contracts shall also be amended to provide that the price so determined and fixed shall be in effect to November 1, 1962, unless changed by the Commission as hereinafter provided, and seller may file for indefinite price increases to be effective on or after November 1, 1962, as provided in the herein proposed amendments to the contracts.

We are not determining that the 18-cent maximum price set herein is the proper price under the standards of the Act as presently constituted or as it might be amended by the Harris Bill. What we are doing is providing a means of protecting the interests of the consuming public while at the same time giving the producers and the pipeline company an opportunity to go forward with their respective construction programs. Under the present provisions of the Act, we have the power to suspend for a period of five months any proposed increased rates; however, to give further assurances to the producers that they will not be penalized by suspension action, we propose to limit suspension of the initial rate increase filing to a period of 24 hours. Thus, the producers are assured of receiving the proper [fol. 534] price under standards of the Act as presently constituted or as they may be constituted at that time.

THE COMMISSION FINDS:

(1) It is necessary and appropriate to modify the Commission's order issued April 22, 1957, in the above-entitled proceeding, in the manner set forth below.

(2) The CATCO companies are able and willing properly to do the acts and to perform the service proposed and

to conform to the provisions of the Natural Gas Act, and the requirements, rules, and regulations of the Commission thereunder.

(3) The sales of natural gas by the CATCO companies to Tennessee Gas, as referred to above, together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, are required by the public convenience and necessity, and permanent certificates therefor should be issued as hereinafter ordered and conditioned.

THE COMMISSION ORDERS:

(A) Permanent certificates of public convenience and necessity are hereby issued to the CATCO companies, without further hearing, authorizing the sale of natural gas to Tennessee Gas, from CATCO's leases in the East Cameron, West Cameron and Vermilion areas off the coast of Louisiana in the Gulf of Mexico, together with the construction and operation of any facilities, subject to the jurisdiction of the Commission, used for such sale, as hereinbefore described and as more fully described in the applications in this proceeding, subject to the conditions set forth below.

(B) Each of the CATCO companies, within 20 days after the issuance of this order, shall file with the Commission a duly executed amendment to Section 10 of the contract submitted as an exhibit to its certificate application providing for sale of natural gas to Tennessee Gas embodying the following language:

> [fol. 535] 10. *Prices*—The prices to be paid by Buyer to Seller for all gas delivered to or, if available and not taken by Buyer, to be paid for hereunder, shall be as follows:
>
> From the date of initial delivery, or November 1, 1957, whichever occurs first - - - - - - 17 cents per Mcf; provided that after the 17-cent price referred to above has been in effect for one day, Buyer agrees that Seller may file with the Federal Power Commission a proposed changed and increased price which shall be not more than 21.4 cents per Mcf, and Seller

shall be entitled to receive and Buyer shall pay such portion of such increased price as may be allowed by the Federal Power Commission under then applicable statutory standards. The price so allowed by the Federal Power Commission shall continue in effect to November 1, 1962, unless otherwise changed by the Federal Power Commission under applicable statutory provisions. Provided that if Seller should determine that the price determinable under applicable statutory standards for gas at the points of delivery for any of the four (4) year periods hereinafter listed should be in excess of the price then being paid hereunder, Seller may notify Buyer, not less than eight months prior to the commencement of such period, that Seller proposes to increase the price to be paid by Buyer hereunder during such period and until a subsequent determination by Seller that the price determinable under then applicable statutory standards is in excess of the price then being paid hereunder, and Seller shall be entitled to receive and Buyer shall pay such portion of such proposed increased price as may be allowed by the Federal Power Commission under then applicable statutory standards.

Any price so determined and fixed shall be not less than the price determined and fixed by the Commission under applicable statutory standards and not more than:

[fol. 536]

23.4 Cents per MCF.....	From November 1, 1962 to November 1, 1966
25.4 Cents per MCF.....	From November 1, 1966 to November 1, 1970
27.4 Cents per MCF.....	From November 1, 1970 to November 1, 1974
29.4 Cents per MCF.....	From November 1, 1974 to November 1, 1978;

and, in the event the term of this contract is extended hereunder beyond November 1, 1978, then not more than

31.4 Cents per MCF.....	From November 1, 1978 to November 1, 1982
33.4 Cents per MCF.....	From November 1, 1982 to November 1, 1986
35.4 Cents per MCF.....	From November 1, 1986 to the expiration of this contract

Except as altered hereinabove, the provisions of Section 10 shall remain unaffected and in full force and effect.

(C) The certificates issued herein shall be accepted in writing and under oath within 30 days from the date of issuance of this order and by such acceptance the CATCO parties shall severally and collectively obligate itself and themselves to commence service upon the completion of construction of the "offshore facilities" by Tennessee Gas. Such acceptance or acceptances shall be accompanied by a resolution of the Board of Directors duly authenticated indicating the approval of the acceptance of the certificates hereby granted.

(D) The certificates issued herein are not transferable and shall be effective only so long as each CATCO company continues the acts or operations hereby au- [fol. 537] thorized in accordance with the provisions of the Natural Gas Act, and the applicable rules, regulations and orders of the Commission.

(E) The grant of the certificates herein shall not be construed as a waiver of the requirements of Section 4 of the Natural Gas Act, or of Part 154 of the Commission's Regulations thereunder requiring the filing of rate schedules for the services herein authorized; and is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against the CATCO companies. Further, our action in this proceeding shall not foreclose nor prejudice any future proceedings or objection relating

to the operation of any price or related provision in the gas purchase contracts herein involved.

(F) Paragraphs (A), (C), (D), (E), and (F) of the order issued April 22, 1957, insofar as they are inconsistent with the provisions of this order, are hereby modified.

By the Commission. Commissioner KLINE concurring in part. Commissioner DIGBY dissenting.

JOSEPH H. GUTRIDE,
Secretary.

[fol. 538]

IN THE MATTERS *of*	
CONTINENTAL OIL COMPANY	Docket No. G-11024
THE ATLANTIC REFINING COMPANY	Docket No. G-11034
CITIES SERVICE PRODUCTION COMPANY	Docket No. G-11046
TIDEWATER OIL COMPANY	Docket No. G-11049

(Issued May 20, 1957)

KLINE, Commissioner, concurring in part:

I concur solely because I see no other ready solution to the problems presented in this proceeding. I feel that under ordinary circumstances the fixing of initial prices in a sales contract is a matter between the producer and purchaser and that the Commission should not attempt to take over this function. I agree with the Commission action in this case solely because of the unusual situation confronting us.

I cannot concur with the Commission action in one respect. I would provide that the contract be amended as set forth in Paragraph (B) of the Commission order only in the event that the Harris Bill becomes law. I would

provide that in the event the bill does not become law the certificate issue at the initial contract price of 21.4¢ per Mcf. The right of the Commission or interveners to invoke Section 5(a) proceedings is sufficient protection to the consumers under existing law.

ARTHUR KLINE,
Commissioner.

[fol. 539]

EXHIBIT E TO PETITION

Application of New York Commission for Rehearing and Rescission of the Order Issued on June 24, 1957.

BEFORE THE

FEDERAL POWER COMMISSION

IN THE MATTERS OF	
CONTINENTAL OIL COMPANY	Docket No. G-11024
THE ATLANTIC REFINING COMPANY	Docket No. G-11034
CITIES SERVICE PRODUCTION COMPANY	Docket No. G-11046
TIDEWATER OIL COMPANY	Docket No. G-11049

The Public Service Commission of the State of New York, an interested State Commission aggrieved by the order issued herein on June 24, 1957, hereby applies for rehearing pursuant to the provisions of Section 19(a) of the Natural Gas Act. We request the Federal Power Commission to reconsider and rescind its order of June 24, 1957, and to reaffirm either of the orders previously issued in these matters on April 22, 1957, and on May 20, 1957.

NATURE OF EXCEPTIONS.

We except to the *conclusion* that public convenience and necessity requires or permits the issuance of permanent cer-

tificates herein at the proposed initial price of 22.4 cents per Mcf, on the ground that said conclusion is not supported by adequate evidence in the record or by adequate findings.

We except to the *finding* that the public served through the system of Tennessee Gas Transmission Company is greatly in need of increased supplies of natural gas, on the ground that there is not a shred of evidence in this record to support the finding, and on the further ground that even if a need for additional supplies at prices no higher than those currently paid may be presumed, need for gas at 22.4 cents cannot.

[fol. 540] ARGUMENT IN SUPPORT OF APPLICATION.

A. Inadequacy of the evidence to support the finding that the public served through Tennessee is greatly in need of increased supplies of natural gas.

The record in this proceeding does not contain a single word of *testimony* to suggest, let alone support the finding, that Tennessee's customers need additional gas. The unsworn and wholly unsupported assertions of Tennessee's Counsel to the effect that certain distributing company customers, one month *before* consummation of the CATCO contract, indicated a desire for additional gas, does not fill this void. Nor is that the kind of "evidence" upon which an administrative agency may lawfully base a finding.

Our motion to consolidate Tennessee's certificate application, G-11107, with the instant proceeding in order to facilitate *proof* of such alleged "need" was opposed by the applicants and denied by the Commission by an order issued herein on March 29, 1957.

These factors (the absence of any evidence in this record of the need for gas and the applicants' unwillingness to submit such proof in this proceeding), together with the failure of any Tennessee's customers to appear in support of the application, and Tennessee's notoriously zealous efforts to persuade opponents of the application to absent themselves from Washington, all cast considerable doubt as to how much, if any, additional gas is desired or "needed" at 22.4 cents per Mcf.

With respect to the April 22, 1957, and May 20, 1957, orders, we do not press the objection that there is no evidence to show a need for the gas, since we do not consider ourselves aggrieved by these orders. In both, the need for additional supplies at reasonable prices was assumed. The most vital aspect of that assumption—price—was left for further inquiry.

We do, however, press this objection most strenuously with respect to the June 24, 1957, order. Underlying that order is nothing more than a wholly baseless assumption that the consuming public needs gas at any price the pro- [fol. 541] ducers choose to exact. We respectfully submit that no one can prove that, much less assume it!

B. Inadequacy of the evidence and the findings to support the conclusion that public convenience and necessity requires or permits the sale at 22.4 cents per Mcf.

The order of June 24, 1957, reveals that the Commission has surrendered its former conviction and ridden rough-shod over its former determinations as to the inadequacy of the instant record to justify the sale at 22.4 cents per Mcf, on the basis of two primary considerations: (1) the "great need" for additional gas by the public served through Tennessee, and (2) the ultimatum of the applicants to withdraw the gas from interstate commerce unless the Commission capitulated to their terms.

These considerations have been potential aspects of this case throughout this proceeding. Although they were apparent and fully appreciated on April 22 and May 20, they were not then regarded as sufficient to induce or permit the Commission to certificate unconditionally these sales at the proposed price. That the Commission was thoroughly convinced of a need for this gas long before June 24 is conclusively demonstrated by the fact that it *granted* temporary certificates on April 22 and permanent certificates on May 20. If it had not on those dates implicitly found or assumed a need for the gas, it would have been obliged to deny the applications without further inquiry.

That it is within the power and discretion of disgruntled applicants to reject certificates and withdraw the service offered is not a novel consideration which first came to light in this proceeding on June 24. That discretion or power is implicit from start to finish in every producer-certificate case under the Natural Gas Act.

The proceeding, at this juncture, squarely presents the question of what proof is required under Section 7(e) of the Natural Gas Act to permit the issuance of certificates of public convenience and necessity.

[fol. 542] Heretofore nothing could have been clearer than the fact that a "vital element" in the proof of public convenience and necessity was concerned with the propriety of the rates proposed in the circumstances surrounding the sale. That had been specifically decided by the Commission in the *Signal Oil* case. See *Cities Service Gas Co., Signal Oil & Gas Co.*, 12 PUR 3d 3, Nos. G-2569, G-2570, Op. No. 288, Nov. 28, 1955. It had been specifically affirmed by the Court in *Signal Oil & Gas Co.*, v. *FPC*, (3d Cir.) 238 F. 2d 771, cert. den. 353 U. S. 923. It had been specifically reiterated by the Commission in the April 22 and May 20 orders issued in this proceeding.

We must now consider whether a need for the gas on the part of consumers accompanied by a threat to withdraw the gas on the part of producers, unless they can exact their chosen price, either (1) eliminates the need for consideration of this "vital element", or (2) itself is proof that the rates proposed are justifiable.* It is our contention that the postulate does not lead to either result.

On its face, the Commission's latest order appears to proceed upon the thesis that the *greater* the demand for the gas, the *less* significant is the question of price. That view, we submit, is utterly incompatible with the Natural Gas Act. The primary, if not the sole purpose of the Natural Gas Act is to protect consumers of gas against

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* We are unable to ascertain, after several rereadings of the June 24 order, which of these positions the Commission there adopts.

exploitation by natural gas companies. There can be no opportunity for exploitation unless demand or need for gas exceeds the supply available on the interstate market. Where that situation occurs, that is, where a demand for gas is present, the statute mandates the Commission to protect the consumer against exploitation. It is obvious, therefore, that the *greater* the demand for gas and the *greater* the accompanying opportunity for exploitation, the *more* significance attaches to the issue of price and the *more* vigilance is required of the Commission to protect the consumer.

[fol. 543] The phrase "public convenience and necessity" does not have a fixed content for all time and all circumstances. It is quite meaningless in itself unless it is related to and given a scope consistent with, the purposes and policies of the statute in which it is found. We find it impossible to comprehend how exploitation can be prevented, particularly in the circumstances presented in this proceeding, if the propriety of price is not to be scrutinized.

The Commission's position is not supported by authority, precedent, logic or the statute. It can only be said to constitute an abandonment of the statutory duty owed the consumer and makes it unmistakably plain to the gas-producing and gas-consuming community alike that if the public wants gas, it is going to have to pay exactly what the producers demand for it. In other words, it would now appear that the Commission is not prepared to offer the consumer one iota more protection than he would have in the unregulated open market if Section 7(e) had never been enacted. We are not hopeful that this feature of the instant proceeding will go unnoticed by the producers.

The always-present power to reject unsatisfactory certificates and the threat to use that power has never, so far as we are aware, been thought to eliminate, modify or affect the proof required by statute to establish public convenience and necessity. It is inconceivable that it should be otherwise, or that public convenience and necessity should ever require or permit abject submission by a regulatory agency to any ultimatum of a regulated company. If the existence of the power to reject, accompanied

by the threat to use it, could eliminate the necessity for proof of one "vital element" of convenience and necessity, it could as readily eliminate the necessity for proof of all other elements. It could justify the issuance of certificates on nothing more than an application together with a threat to reject any certificate which failed to grant everything the application demanded. In the *Signal* case, where the power to reject certificates was every bit as real as it is here, the Commission nevertheless held that proof of the propriety of price was required. Can it be said that the [fol. 544] truisms therein espoused become gibberish when the applicant bespeaks himself of that power?

It may be quite true that under the Natural Gas Act the Commission is powerless to compel the dedication of additional gas to interstate commerce. We do not believe, however, that that fact permits emasculation of the provisions of the statute which direct the Commission to control and regulate, for the benefit of the consumer, the terms, conditions and prices at which interstate gas shall flow. The mandate of Section 7(e) that the Commission must scrutinize price in order to fulfill its statutory obligation to protect consumers against exploitation, cannot be ignored simply because applicants *may* be so ill-advised as to make good their threats to kill the goose that lays their golden egg.

CONCLUSION.

The requirement of Section 7(e) of the Natural Gas Act that each applicant prove that public convenience and necessity requires the sale of his gas in interstate commerce at his proposed rate, as enunciated by the Commission in the *Signal Oil* case, as confirmed by the Court in *Signal Oil & Gas Co.* v. *FPC*, *supra*, and as again reiterated by the Commission on April 22 and May 20, cannot be discharged, nor may the need for such proof be eliminated, simply by noting that the public demands gas and the producers have the power to withhold it.

It is impossible to ignore the fact that the importance of this case now far exceeds the limited issues originally presented. If unsupported allegations of need for gas and

untested threats to withhold it will effectively emasculate all semblance of certificate and price regulation, the lesson is clear not only to the present applicants, but to all producers of natural gas.* On the other hand, if the Commis- [fol. 545] sion stands firm upon its own convictions and upon its judicially blessed interpretation of the requirements of proof under the Natural Gas Act, there is no reason to anticipate dire results. No one can reasonably suggest that all future supplies of gas can be economically marketed in their states of origin. Indeed we are firmly convinced that if the CATCO gas could have been marketed in Louisiana anywhere nearly as profitably as it can in interstate commerce, it would have been sold there long before this. But in any event, when they or any other natural gas companies turn to interstate markets, it should be on terms fully disclosed to and approved by the Federal Power Commission, which has the statutory obligation of protecting the public interest, and not on the terms arrogantly and irresponsibly dictated by the applicants.

The order of June 24, 1957 should be rescinded and either of the orders of April 22 or May 20, 1957 reaffirmed. The evidence in this record is totally inadequate to support the conclusion that the sale at 22.4 cents per Mcf is required by public convenience and necessity.

Respectfully submitted,

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,

By /s/ KENT H. BROWN
Counsel,
55 Elk Street,
Albany 1, New York.

Dated: July 22, 1957

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* In fact, the pattern is already becoming sharply defined. In its July 12, 1957 order, issued in *Southern National Gas Co., et al.*, Doc. Nos. G-11234, *et al.*, the Commission has not only granted certificates of convenience and necessity on inadequate proof pertaining to price, but also has even refused to permit intervention by the New York Commission, thereby precluding any presentation of the issue of the sufficieney of the record in this respect.

[fol. 546]

EXHIBIT F TO PETITION

Order Denying Applications for Rehearing.

(Issued August 15, 1957)

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: FREDERICK STUECK, Acting Chairman; SEABORN L. DIGBY, WILLIAM R. CONNOLE and ARTHUR KLINE.

IN THE MATTERS *of*	
CONTINENTAL OIL COMPANY	Docket No. G-11024
THE ATLANTIC REFINING COMPANY	Docket No. G-11034
CITIES SERVICE PRODUCTION COMPANY	Docket No. G-11046
TIDEWATER OIL COMPANY	Docket No. G-11049

On July 23, 1957, Public Service Electric and Gas Company, The Long Island Lighting Company, and the New York Public Service Commission, and on July 24, 1957, Lake Shore Pipe Line Company, have filed applications for rehearing under Section 19(b) of the Natural Gas Act of our order issued June 24, 1957. In that order upon rehearing, we reversed and set aside our previous orders of April 22, 1957, and May 20, 1957, and adopted, with certain modifications, the initial decision of the presiding examiner granting certificates of public convenience and necessity to Continental Oil Company, The Atlantic Refining Company, Cities Service Production Company, and Tidewater Oil Company (CATCO), for the sale of natural gas from their offshore platforms in the Gulf of Mexico to [fol. 547] Tennessee Gas Transmission Company. We noted that rate investigations had been instituted against Continental Oil, Atlantic and Tidewater, and contemporaneously with our order we instituted a rate investigation

against Cities Service. The certificates issued by our June 24 order have been accepted by all four companies.

The applications do not set forth any contentions or other matter that was not considered by us in connection with our June 24, 1957, order except that the Long Island Lighting Company objects to our adopting the findings of fact and conclusions of the presiding examiner in certain respects. Upon considering this matter further we are of the opinion that our order properly stands upon our own discussion of the facts. Therefore it will not be necessary to adopt the presiding examiner's conclusions on the facts except for the ultimate result of issuing the certificates. We do adopt, however, his recital of the facts.

THE COMMISSION FINDS:

The applications for rehearing of our order issued on June 24, 1957, in this proceeding, except as stated above, set forth no new facts and no principles of law which either were not fully considered by the Commission when it issued that order or which having now been considered warrant any change in or modification of such order. All contentions and objections not specifically discussed or referred to herein have been considered and found either without basis in law or support in fact, but are not sufficiently material to warrant individual treatment or have been adequately disposed of otherwise.

THE COMMISSION ORDERS:

(A) The above applications for rehearing filed on July 23 and 24, 1957 with respect to our order of June 24, 1957, are hereby denied.

[fol. 548] (B) In place of ordering Clause (F) of our order of June 24, 1957, we adopt the recital of facts made by the presiding examiner and his conclusion that certificates of public convenience and necessity should be issued to the CATCO companies.

By the Commission. Commissioner Connole dissenting.

JOSEPH H. GUTRIDE,
Secretary

[fol. 549]

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT.

No. 12,403

LONG ISLAND LIGHTING COMPANY,
PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Petitioners,

versus

FEDERAL POWER COMMISSION,
Respondent.

JOINT AND SEVERAL PETITION FOR REVIEW OF DECISION AND ORDER OF THE FEDERAL POWER COMMISSION.

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In the

United States Court of Appeals

FOR THE THIRD CIRCUIT

No.

LONG ISLAND LIGHTING COMPANY,
PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Petitioners,

versus

FEDERAL POWER COMMISSION,
Respondent.

JOINT AND SEVERAL PETITION FOR REVIEW OF DECISION AND ORDER OF THE FEDERAL POWER COMMISSION.

To the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit:

The joint and several petition of LONG ISLAND LIGHTING COMPANY and PUBLIC SERVICE ELECTRIC AND GAS COMPANY, hereinafter called respectively "Petitioner Long Island" and "Petitioner Public Service", being a petition for review filed pursuant to and in accordance with Acts of Congress hereinafter referred to, for the review of an order of the Federal Power Commission, hereinafter called "Respondent," respectfully shows that:

I.

Petitioner Long Island is a corporation duly organized and existing under the Transportation Corporations Law of the State of New York, having its office and principal

place of business at 250 Old Country Road, Mineola, New York, and being engaged in the business of manufacturing, distributing and selling gas and electricity. Petitioner Long Island distributes and sells gas to approximately 282,000 customers on Long Island in the Counties of Nassau and Suffolk and in a portion of the County of Queens in the State of New York, which area has a population of approximately 1,600,000 persons.

II.

Petitioner Public Service is a public utility duly incorporated and existing under the laws of the State of New Jersey, having its principal and executive offices at 80 Park Place, Newark 1, New Jersey, and being engaged in the manufacture and distribution of gas and electricity. Petitioner Public Service distributes and sells gas to approximately 1,000,000 customers in an area extending from the Hudson River opposite New York City to the Delaware River at Trenton and thence to Camden, New Jersey, which area has a population of approximately 3,400,000 persons.

III.

Petitioner Long Island and Petitioner Public Service each are customers of and purchase a portion of the natural gas which they distribute and sell to consumers in their respective territories from Tennessee Gas Transmission Company and purchase the balance of their respective natural gas requirements from other interstate natural gas pipeline companies which acquire a major part of their natural gas from producers in the Gulf Coast Area from which the natural gas authorized in these proceedings to be sold and delivered to Tennessee Gas Transmission Company will be produced.

IV.

The Federal Power Commission, Respondent, is a Commission created under the laws of the United States and is

[fol. 555] 3

composed of Jerome K. Kuykendall, Chairman, Seaborn L. Digby, Frederick Stueck, William R. Connole and Arthur Kline, Commissioners, who are duly appointed, qualified and acting members of said Commission, and that said Commission and the members thereof perform their functions and official duties and have their principal offices at 441 G Street, N. W., in the City of Washington, District of Columbia.

V.

Jurisdiction and Venue.

(a) This Court has jurisdiction of this petition for review under the provisions of the Administrative Procedure Act (5 USC 1009), and more particularly under Section 19(b) of the Natural Gas Act (15 USC 717 r(b), of June 21, 1938, as amended) which provides in part as follows:

> "(b) Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. • • •"

(b) This petition presents to this Court for review an order of the Federal Power Commission, Respondent, issued June 24, 1957, entitled "Order, Upon Application for Rehearing, Adopting Initial Decision of Presiding Examiner with Modifications and Conditions", which order

was issued in the proceedings entitled "In the Matters of Continental Oil Company, Docket No. G-11,024, The Atlantic Refining Company, Docket No. G-11,034, Cities Service Production Company, Docket No. G-11,046, Tidewater Oil Company, Docket No. G-11,049", which proceedings were consolidated and publicly heard as a consolidated proceeding by said Commission Respondent. A true copy of said order of the Commission Respondent issued June 24, 1957, is annexed hereto as Exhibit "A" for all necessary purposes hereof.

(c) By petition to the Respondent dated October 15, 1956 and February 19, 1957 respectively, Petitioner Long Island and Petitioner Public Service asked that they be permitted by Respondent to intervene in and be made parties to the aforesaid consolidated proceedings. The Respondent by its order issued February 27, 1957, permitted the intervention of Petitioner Long Island and Petitioner Public Service in the said proceedings. Thereafter Petitioner Long Island and Petitioner Public Service actively participated as parties in said proceedings by being represented by counsel at public hearings held therein, by filing initial and reply briefs, pleadings and exceptions to the decision of the Respondent's Examiner designated to preside at the public hearings held in said proceedings issued March 29, 1957, and by participating in oral argument before the Commission Respondent.

(d) On July 23, 1957, Petitioner Long Island and Petitioner Public Service each filed with the Respondent an application for rehearing under Section 19(b) of the Natural Gas Act of the Respondent's said order issued June 24, 1957. The said application to the Respondent for rehearing of Petitioner Long Island and the said application for rehearing of Petitioner Public Service are annexed hereto as Exhibit "B" and Exhibit "C", respectively, for all necessary purposes hereof.

(e) By its order issued August 15, 1957 entitled "Order Denying Applications for Rehearing", Respondent denied

[fol. 557]

Petitioner Long Island's and Petitioner Public Service's applications for rehearing and amended its said order issued June 24, 1957, in these proceedings; a copy of Respondent's said order denying the applications for rehearing and amending its said order of June 24, 1957 is annexed hereto as Exhibit "D" for all necessary purposes hereof.

(f) The proceedings before the Respondent in the aforementioned Commission Docket Nos. G-11,024, G-11,034, G-11,046 and G-11,049 were initiated by applications filed with the Respondent, pursuant to Section 7 of the Natural Gas Act, by Continental Oil Company on September 5, 1956, The Atlantic Refining Company on September 7, 1956, and Cities Service Production Company and Tidewater Oil Company on September 10, 1956, for certificates of public convenience and necessity authorizing the sale of natural gas from their leases off the coast of the State of Louisiana to Tennessee Gas Transmission Company.

(g) Tennessee Gas Transmission Company is a natural gas company and Respondent by its original order issued on April 22, 1957, entitled "Findings and Order Issuing Temporary Certificates of Public Convenience and Necessity" has found and determined in these proceedings that Continental Oil Company, The Atlantic Refining Company, Cities Service Production Company and Tidewater Oil Company upon the commencement of the sales of natural gas to Tennessee Gas Transmission Company authorized by Respondent in these proceedings, will each be a natural gas company within the meaning of the Natural Gas Act if they are not already in this status because of other transportation or sales. A copy of Respondent's said order of April 22, 1957 and a copy of the subsequent order of Respondent entitled "Findings and Order Issuing Permanent Certificates of Public Convenience and Necessity and Modifying Previous Order", issued on May 20, 1957, which modified said order of April 22, 1957, are annexed hereto as Exhibits "E" and "F" for all necessary purposes hereof.

(h) Tennessee Gas Transmission Company, Continental Oil Company, Cities Service Production Company and Tidewater Oil Company are each corporations incorporated and existing under the laws of the State of Delaware and The Atlantic Refining Company is a corporation incorporated and existing under the laws of the State of Pennsylvania.

(i) Venue is vested in this Court under Section 19(b) of the Natural Gas Act for the reason that all of the natural gas companies to which the Respondent's orders issued in these proceedings relate, namely, Continental Oil Company, The Atlantic Refining Company, Cities Service Production Company, Tidewater Oil Company and Tennessee Gas Transmission Company are all located within the jurisdiction of the United States Court of Appeals for the Third Circuit.

(j) Under the provisions of Section 19(a) of the Natural Gas Act (15 USC 717r) and in consequence of the foregoing, Petitioner Long Island and Petitioner Public Service, being parties aggrieved by the said order issued by Respondent in these proceedings on June 24, 1957, as amended by Respondent's order issued August 15, 1957, have the right to obtain a review of said orders in this Court.

VI.

Assignment of Errors.

Petitioner Long Island and Petitioner Public Service state that said order of Respondent issued June 24, 1957 as amended by Respondent's order issued August 15, 1957, is unreasonable, capricious, arbitrary, contrary to law and should be vacated and set aside for the following reasons:

1. The Respondent is in error in holding that the public convenience and necessity require the granting of permanent certificates of convenience and necessity to the producer applicants, Continental Oil Company, The Atlantic

[fol. 559]

Refining Company, Cities Service Production Company and Tidewater Oil Company in these proceedings without conditioning the certificates with respect to the initial price of 22.4 cents per Mcf (including one cent per Mcf for the Louisiana gathering tax) that said applicants will receive for the natural gas they propose to sell to Tennessee Gas Transmission Company. The Respondent as a matter of law cannot grant these producer applicants permanent certificates upon a determination based entirely on an unsubstantiated need for additional natural gas by Tennessee's customers. A proper and lawful certificate can only be granted under the Natural Gas Act on a determination based on adequate evidence that the applicants are able and willing to furnish the proposed service, the proposed sales of natural gas to Tennessee are required, *and* that the rates under which the proposed service will be rendered are in the public interest.

2. The Respondent is in error in granting the producer applicants, Continental Oil Company, The Atlantic Refining Company, Cities Service Production Company and Tidewater Oil Company, permanent certificates unconditioned with respect to the initial price because the evidence of record does not contain sufficient evidence on which a proper and necessary legal finding can be made that the public convenience and necessity require the sale of the volumes of natural gas by the said applicants to Tennessee at the initial price of 22.4 cents per Mcf. In these proceedings Respondent itself has twice found that the record contains insufficient evidence or testimony on which Respondent can base a proper, necessary and legal finding that public convenience and necessity requires the sale of the volumes of natural gas by these producer applicants to Tennessee at the particular rate level proposed. In its order of April 22, 1957 (Exhibit "E" annexed hereto) the Respondent Commission said in part:

> "The record contains insufficient evidence or testimony, however, on which to base a finding that the

public convenience and necessity requires the sale of these volumes of gas at the particular rate level here proposed. The importance of this issue in certificating this sale cannot be easily overemphasized. This is the largest reserve ever committed to one sale. This is the first sale from the newly developed offshore fields from which large proportions of future gas supplies will be taken. This is the highest price level at which the sale of gas to Tennessee Gas has been proposed.

"These factors make it abundantly evident that, in the public interest, this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest. See Cities Service Gas Co., Signal Oil and Gas Co., 14 F. P. C. opinion No. 288, Nos. G-2569, G-2570, November 28, 1955, affirmed as Signal Oil and Gas Co. *v.* F. P. C., 238 F. 2d 771 (CA3), certiorari denied, 353 U. S. 923. * * * "

Again in its May 20, 1957 order (Exhibit "F" annexed hereto) in referring to the initial price the Respondent said:

"* * * As we have already stated, the record does not contain sufficient evidence on which to base a finding that the public convenience and necessity requires the sale of the gas at that particular rate level. * * * "

No further evidence or testimony was supplied or introduced after the issuance of Respondent's said orders of April 22, 1957, and May 20, 1957. Absent sufficient evidence on which Respondent can base a finding that the public convenience and necessity requires the sale of the proposed volumes of gas by the said producer applicants to Tennessee Gas Transmission Company at the proposed initial rate, Respondent is in error in concluding that it can law-

fully determine that the proposed sales are in the public interest and that it can lawfully grant permanent certificates of public convenience and necessity to the said producer applicants as it has done by the issuance of its said order of June 24, 1957.

3. The Respondent is in error in finding and concluding, as it does that by its said order of June 24, 1957, Petitioner Long Island and Petitioner Public Service and their respective consumers are afforded the protection against unreasonable initial prices in the manner required by the Natural Gas Act by postponing any decision as to whether the said producer applicants' initial rates are reasonable and required in the public interest to subsequent rate proceedings initiated by Respondent or others under Section 5(a) of the Natural Gas Act. Postponement of a determination of the justness and reasonableness of the initial rates of the said producer applicants in these proceedings to subsequent rate proceedings brought under Section 5(a) of the Natural Gas Act does not provide Petitioner Long Island and Petitioner Public Service and their consumers the protection against unjust and unreasonable initial rates that the Natural Gas Act requires for the following reasons:

(a) The said producer applicants' rate schedules containing the initial price of 22.4 cents per Mcf will not be filed with Respondent until shortly before deliveries of the natural gas are made to Tennessee. After such filings are made the Section 5(a) rate investigations ordered by Respondent in its June 24, 1957 order will begin. After the investigations of Respondent are completed, public hearings will be held and the Respondent's customary procedural processes will be followed, resulting after a considerable time in an order of Respondent with respect to the said producer applicants' initial rates. As Respondent's order in the Section 5(a) rate proceedings would speak only prospectively and not retroactively with respect to the initial rates, the untested initial rates would be in effect

from the time when deliveries of the natural gas by the said producer applicants to Tennessee Gas Transmission Company commenced until the date of the Respondent's order in the Section 5(a) proceedings. Should Respondent eventually determine that the said producer applicants' initial rates were in fact unjust and unreasonable and order them reduced, the said producer applicants in these proceedings would not be required to make any refunds on deliveries of natural gas made to Tennessee Gas Transmission Company at the initial rate up to the date of the Respondent's order. Such procedure permits the producer applicants in these proceedings to be paid an initial rate for their gas delivered to Tennessee Gas Transmission Company which initial rate the Respondent may subsequently determine is unjust and unreasonable.

(b) The Section 5(a) rate procedure that the said producer applicants have demanded and the Respondent in error has acceded to in these proceedings would place the burden on the Respondent to establish that the initial rate was higher than a just and reasonable rate and relieve the said producer applicants of the proper, necessary and legal burden of establishing in the certificate proceedings under Section 7 of the Natural Gas Act that the public interest and public convenience and necessity required the proposed service at the proposed initial price level. The burden of establishing in a certificate proceeding that the public convenience and necessity require the proposed service at a particular price level is, under the Natural Gas Act on the person seeking to take advantage of the proposed service and not on the tribunal before which the case is to be made.

(c) The Respondent itself in the Cities Service-Signal Oil and Gas Company proceedings by its opinion and order No. 288 issued therein has referred to the weaknesses and inadequate protection afforded by postponing consideration of the initial price issue in producer certificate proceedings to subsequent Section 5(a) rate proceedings under the Nat-

ural Gas Act. In its said Opinion No. 288 Respondent correctly held that the applicant-seller had the burden in a certificate case of proving all elements of its application so that the Respondent could conclude that the proposed service was in the public interest and required by the present and future public convenience and necessity. In its said Opinion No. 288 the Respondent clearly and correctly stated that a vital element of such proof in a certificate proceeding is concerned with the rates proposed.

By its said order of June 24, 1957, in these proceedings Respondent has repudiated its doctrine of the Cities Service-Signal Oil and Gas Company case which has been sustained by this Court and denied Petitioner Long Island and Petitioner Public Service and their respective consumers the full and adequate protection against unjust and unreasonable initial rates that the Natural Gas Act provides and requires.

The failure of the Respondent to exercise its power to condition the permanent certificates with respect to the initial price under all the facts and circumstances of this case was arbitrary, capricious and amounts to an abuse of its administrative discretion.

(d) In its said order of May 20, 1957 (Exhibit "F" annexed hereto), the Respondent refers to another reason why a 5(a) review of the initial prices may not afford Tennessee's customers and their consumers full protection against an unjust and unreasonable initial price. The Respondent in its May 20th order stated:

> "• • • Furthermore, under the provisions of the so-called Harris Bill, if it is enacted into law, the proposed initial price might no longer be subject to adjustment by us. • • •"

While the Respondent in this proceeding must proceed under the existing law, the Respondent is not to be pre-

sumed to be unaware of the effect of a proposed bill now before Congress.

By its said May 20th order the Respondent provided an effective procedure that was fair and equitable to all parties, and provided adequate protection to Tennessee's customers and their consumers, both under the present law and under the proposed Harris Bill (H. R. 8525—85th Congress, 1st Session) if enacted. With respect hereto reference is made to paragraphs 5, 6 and 7 of the Respondent's order of May 20, 1957 (Exhibit "F" annexed hereto).

In the event of the enactment of the so-called Harris Bill, the Respondent by its order of June 24, 1957 and the 5(a) procedure provided therein, has removed the protection against this very contingency that concerned the Respondent as indicated by the above quotation from its said May 20th order.

(e) In these proceedings the said producer applicants have represented to the Respondent that they could not present sufficient evidence in justification of the initial rate within any reasonable period of time in the future. If the producer applicants themselves are faced with this difficulty, certainly the Respondent and these Petitioners would be faced with even greater difficulty, to the detriment of the ultimate consumers of the natural gas and an unlawful windfall to the said producer applicants will result.

4. The Respondent is in error in finding and concluding that Tennessee Gas Transmission Company's customers are shown by the record in these proceedings to be so sorely in need of additional natural gas, that regardless of the initial price the proposed sales by the said producer applicants to Tennessee Gas Transmission Company should be authorized and permanent certificates of public convenience and necessity issued. The record in these proceedings does not contain competent, material, and relevant evidence which supports the finding of the Respondent that

the public served through the Tennessee system is greatly in need of increased supplies of natural gas.

5. The Respondent is in error in abandoning the position it took in its previous orders of April 22, 1957, and May 20, 1957, by issuing its said order of June 24, 1957, in the face of threats by the said producer applicants in these proceedings to cancel their contracts with Tennessee Gas Transmission Company and withdraw their gas from the interstate market unless Respondent issued permanent certificates of public convenience and necessity only on the terms demanded by the said producer applicants themselves. The action of June 24, 1957, taken in the face of threats by producer applicants to cancel their contracts and without any substantial evidence in the record that the loss of this quantity of gas would so imperil Tennessee Gas Transmission Company's gas reserves that Tennessee would be unable to render proper service, thus warranting the granting of these certificates regardless of price, was unlawful, arbitrary, capricious, amounted to an abuse of Respondent's administrative discretion, and deprived Petitioners and their consumers of the protection afforded by the Natural Gas Act.

6. The Respondent is in error by issuing its order of June 24, 1957, granting permanent certificates of public convenience and necessity to the said producer applicants without a determination that the initial price was in the public interest and required by the public convenience and necessity. Respondent thereby has set a new "highest price level" for gas produced in the Gulf Coast area of Louisiana which Tennessee Gas Transmission Company and Petitioners' other pipe line suppliers will be required to pay for additional gas purchased from producers in this area.

7. The Respondent erred in not exercising its power to impose a rate condition in view of the evidence of record

which clearly shows that there was a complete absence of competition among the four producer applicants.

8. The Respondent erred in issuing the certificates of public convenience and necessity because the applicants failed to prove by competent evidence that they are able and willing properly to do the acts and to perform the service proposed, and to conform to the provisions of the Natural Gas Act and the applicable rules, regulations and orders of the Commission Respondent.

9. The Respondent erred in not imposing a rate condition because the actual price which Tennessee will be obligated to pay cannot be determined from the evidence.

VII.

All of the foregoing objections to the said order of Respondent issued June 24, 1957, were set forth and urged by Petitioners before the Commission in their applications for rehearing referred to herein and annexed hereto as Exhibits "B" and "C" respectively.

VIII.

Relief Prayed.

WHEREFORE, Petitioners respectfully pray that this Court:

1. Serve a copy of this petition upon any member of the Respondent, Federal Power Commission, pursuant to the provisions of Section 19(b) of the Natural Gas Act (15 USC Section 717r(b)).

2. Require said Respondent to certify and file with this Court a transcript of the record upon which the Respondent's order issued June 24, 1957, was entered.

3. Review the order issued June 24, 1957, by the Respondent, Federal Power Commission, as modified by the order issued August 15, 1957, and enter a judgment vacating and setting said order aside.

4. Grant such other and further relief as the rights of Petitioners and the equities may render appropriate in the premises.

Respectfully submitted,

David K. Kadane,
Edward M. Barrett,
Attorneys for Long Island
Lighting Company,
250 Old Country Road,
Mineola, New York.

Edward S. Kirby,
Attorney for Public Service Electric
and Gas Company,
80 Park Place,
Newark, New Jersey.

Dated: October 11, 1957.

Affidavit of Edward S. Kirby.

STATE OF NEW JERSEY,
COUNTY OF ESSEX. } ss.:

BEFORE ME, the undersigned Notary Public in and for the above named County and State, personally came and appeared EDWARD S. KIRBY, who, being duly sworn, deposes and says:

That the allegations of fact set forth in the foregoing joint and several petition for review are true and correct and that the Exhibits attached to said joint and several petition are true copies of the originals of the orders or other papers which comprise said Exhibits.

.....
(EDWARD S. KIRBY)

Sworn and subscribed to before me
this 10th day of October, 1957.

MURIEL I. YOBS,
Notary Public of New Jersey,
My Commission Expires September 8, 1959.

[fol. 569] 17

Affidavit of Edward M. Barrett.

STATE OF NEW YORK, }
COUNTY OF KINGS. } ss.:

BEFORE ME, the undersigned Notary Public in and for the above named County and State, personally came and appeared EDWARD M. BARRETT, who, being duly sworn, deposes and says:

That the allegations of fact set forth in the foregoing joint and several petition for review are true and correct and that the Exhibits attached to said joint and several petition are true copies of the originals of the orders or other papers which comprise said Exhibits.

.....
(EDWARD M. BARRETT)

Sworn and subscribed to before me }
this 10th day of October, 1957. }

JOHN A. QUINN,
Notary Public State of New York,
No. 43-3185700,
Commission Expires March 30, 1959.

[fol. 571] 19

Exhibit "A".

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners:

Frederick Stueck, Acting Chairman; Seaborn L. Digby, William R. Connole and Arthur Kline.

IN THE MATTERS *of* CONTINENTAL OIL COMPANY, THE ATLANTIC REFINING COMPANY, CITIES SERVICE PRODUCTION COMPANY, TIDEWATER OIL COMPANY.	Docket No. G-11024 Docket No. G-11034 Docket No. G-11046 Docket No. G-11049

ORDER, UPON APPLICATION FOR REHEARING, ADOPTING INITIAL DECISION OF PRESIDING EXAMINER WITH MODIFICATIONS AND CONDITIONS.

(Issued June 24, 1957.)

On June 4, 1957, Tennessee Gas Transmission Company (Tennessee Gas) filed an application for rehearing and reconsideration of the Commission's order issued in these proceedings on May 20, 1957. By order issued June 6, 1957, we granted rehearing and in such order provided for oral argument "upon the contentions made and issues presented by the application for rehearing, the motion for modifica-

tion and the answers thereto heretofore filed in these proceedings.'"[1]

Pursuant to the order granting rehearing we heard oral argument on June 12, 1957.

The Commission's order issued May 20, 1957, modified an earlier order issued April 22, 1957, granting temporary certificates of public convenience and necessity to CATCO and to Tennessee Gas in Docket No. G-11107.

The temporary certificates issued by our order of April 22, 1957, authorized CATCO to sell natural gas to Tennessee Gas from CATCO's leases in the East Cameron, West Cameron and Vermilion areas off the coast of Louisiana in the Gulf of Mexico, and authorized Tennessee Gas to construct and operate approximately 107 miles of pipeline from the offshore platforms of CATCO to a point on its main system at Kinder, Louisiana.

The contracts for the sale of gas executed between each of the CATCO companies and Tennessee Gas which are exhibits in these proceedings provide for an initial price of 21.4 cents per Mcf[2] and for a definitely fixed price escalation of two cents per Mcf every four years.

As has been indicated hereinbefore, the CATCO companies filed a motion for modification of the Commission's

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[1] On May 6, 1957, Continental Oil Company, The Atlantic Refining Company, Cities Service Production Company and Tidewater Oil Company (collectively referred to as CATCO) filed a motion for modification of the Commission's order issued April 22, 1957, granting temporary certificates of public convenience and necessity to CATCO and Tennessee Gas and directing that the proceedings "be remanded to the presiding examiner to determine at what rate the public convenience and necessity requires the sale of natural gas by CATCO to Tennessee Gas to be made if these CATCO companies are granted permanent certificates of public convenience and necessity." Answers to the motion were filed by New York Public Service Commission, Lake Shore Pipe Line Company, Brooklyn Union Gas Company and Long Island Lighting Company (jointly), and Public Service Electric and Gas Company (collectively referred to as Interveners) opposing the motion. Tennessee Gas filed an answer supporting the motion.

[2] Reimbursement for the one-cent Louisiana gathering tax would be added to this amount.

order issued April 22, 1957. In the motion the CATCO companies indicated that they were unwilling to accept temporary certificates of public convenience and necessity under the conditions specified in the Commission's order. They, however, proposed that the Commission issue permanent certificates permitting them to charge the initial agreed-upon price of 21.4 cents per Mcf, but agreed to modify therein respective contracts for the sale of natural gas to Tennessee Gas in such manner that the future price escalations contained in the contracts would remain subject to the Commission's scrutiny and jurisdiction in the event the Harris Bill, H. R. 6790, 85th Cong., were enacted into law. The proposed contract amendments would provide that if the Harris Bill were enacted, the price for gas would escalate up to the then current reasonable market price but not more than two cents per Mcf every four years.

In response to the motion we issued our May 20, 1957, order in which we granted permanent certificates of public convenience and necessity to the CATCO companies on condition that the contracts between the CATCO companies and Tennessee Gas be amended so as to provide for an initial price of 17 cents per Mcf, with provision for filing a request for an increase in such price to 21.4 cents per Mcf one day after the initial price became effective. Under the condition provision was also made for the incorporation in such contract of indefinite price escalations, with a ceiling increasing by two cents every four years.

In its application for rehearing filed June 4, 1957, Tennessee Gas has stated that it had been advised that the CATCO companies were unwilling to accept the permanent certificates of public convenience and necessity granted by the May 20, 1957, order because they objected to the pricing and other conditions specified in the order, and that they would terminate the contracts so that the large supply of gas contained in the off-shore reserves of the CATCO com-

panies would not become available to the customers of Tennessee Gas. At the oral argument it became apparent that the CATCO companies objected to the 17-cent initial price set in the May 20, 1957, order. On the other hand, the CATCO companies indicated that they would still be willing to amend their contracts as proposed in their motion of May 6, 1957. They indicated further that if they failed to obtain certificates without price conditions which they considered objectionable, they would seek to dispose of their gas elsewhere than to Tennessee Gas and the interstate market.

In the present status of the case we are left with the difficult problem of how to assure the delivery of this gas to the large market served by Tennessee Gas, and at the same time protect the consumers from an unreasonably high price. In reaching a solution to this problem we are moved by the primary consideration that the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas. Further, it appears to us, important as is the issue of price, that as far as the public is concerned, the precise charge that is made initially is less important than the assurance of this great supply of gas. In view of these circumstances and the fact that the record does not show that the 21.4-cent rate is necessarily excessive, we agree with the presiding examiner that this certificate proceeding under Section 7 of the Natural Gas Act should not assume the character of a rate proceeding under Section 5(a). We are of the opinion that, in the circumstances of this case, in view of the great demand for gas by customers of Tennessee Gas, the price consideration should not be made the prime determinant of what the public convenience and necessity require. By virtue of the authority conferred upon us by Sections 4 and 5 of the Natural Gas Act and the proposal to modify the contracts made by the CATCO companies, we are of the opinion that we will be

able to adequately protect the public interest with respect to the matter of price. In order, therefore, to insure that deliveries of gas by the four CATCO companies to Tennessee Gas will commence as promptly as possible, we will grant permanent certificates to them by this order without any condition affecting the initial price of 21.4 cents per Mcf.

However, because the 21.4-cent price, as we have heretofore observed, is higher than Tennessee Gas is paying under any other contract, it should be subject to prompt investigation under Section 5 (a) as to its reasonableness. In this connection, we may note that when three of the CATCO companies, Continental Oil, Atlantic Refining and Tidewater Oil file their contracts with Tennessee Gas as rate schedules as required by the Natural Gas Act and our Regulations, such contracts will be subject to rate investigations now outstanding against these companies. Thus, by our order issued January 27, 1956, in Docket Nos. G-9283 and G-9284, we instituted an investigation of any of the rates or charges of Atlantic Refining and Tidewater Oil with respect to any transportation or sale of natural gas subject to our jurisdiction, and by our order issued the same day in Docket No. G-9279, we instituted a similar investigation of the rates and charges of Continental Oil. Concurrently with this order we are instituting in Docket No. G-12780 an investigation of the rates and charges of Cities Service. By this means relief can be afforded to the consuming public if it should be found that the 21.4-cent initial rate to be charged for the off-shore gas is excessive.

It appears to be true that if the Harris Bill, H. R. 6790, 85th Congress, or some bill similar to it, becomes law and that we may lose continuing supervision over the future increased prices provided in the several contracts between the CATCO companies and Tennessee Gas. Therefore, we shall adopt the proposal of the companies made in their

motion for modification of May 6, 1957, that they amend their contracts so that the price increases will remain subject to our control by using "indefinite pricing clauses" rather than "definite pricing clauses" within the meaning of the Harris Bill. They propose to do this, as indicated above, by providing that the initial sales price shall be 21.4 cents per Mcf until November 1, 1962, as at present, but after that the "reasonable market price" within the meaning of the bill and as determined by this Commission shall prevail. Adjustments would be initiated by the sellers at four-year intervals but would be limited by the step increases now provided in the contracts. The CATCO companies state that Tennessee Gas is agreeable to this arrangement and will enter into such an amendment with each of the CATCO companies.

The Commission finds:

(1) It is necessary and appropriate in the public interest to adopt the initial decision of the presiding examiner with modifications and conditions and to modify the Commission's order issued May 20, 1957, in the above-entitled proceedings, in the manner set forth below.

(2) The CATCO companies are able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Natural Gas Act, and the requirements, rules, and regulations of the Commission thereunder.

(3) The sales of natural gas by the CATCO companies to Tennessee Gas, as referred to above, together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, are required by the public convenience and necessity, and permanent certificates therefor should be issued as hereinafter ordered and conditioned.

[fol. 577] 25

Exhibit "A".

The Commission orders:

(A) Permanent certificates of public convenience and necessity are hereby issued to the CATCO companies, without further hearing, authorizing the sale of natural gas to Tennessee Gas, from CATCO's leases in the East Cameron, West Cameron and Vermilion areas off the coast of Louisiana in the Gulf of Mexico, together with the construction and operation of any facilities, subject to the jurisdiction of the Commission, used for such sale, as hereinbefore described and as more fully described in the applications in this proceeding.

(B) Each of the CATCO companies, within 20 days after the issuance of this order, shall file with the Commission a duly executed amendment to the contract submitted as an exhibit to its certificate application providing for sale of natural gas to Tennessee Gas embodying the following language:

> If and in the event that H. R. 6790 or any substantially similar legislation is enacted into law by the 85th Congress, and becomes effective, then the provisions of Section 10, *Prices,* commencing with the portion thereof reading
> "From the date of initial delivery or November 1, 1957, whichever occurs first, until November 1, 1962.....21.4 Cents per MCF"
> to and including that portion thereof reading
> "From November 1, 1986 to expiration of this contract .....35.4 Cents per MCF"
> is hereby deleted, and the following is substituted in lieu thereof:
> From the date of initial delivery or November 1, 1957, whichever occurs first, and thereafter .....21.4 Cents per MCF
> Provided that, after November 1, 1962, Seller shall

be entitled to receive and Buyer shall pay the reasonable market price, if higher than 21.4 cents per Mcf, for the gas at the points of delivery within the limitations and subject to the terms and conditions as hereinafter set forth. Such reasonable market price shall be that as fixed by the Federal Power Commission under applicable law, after initial determination thereof by Seller as herein provided. If Seller should determine that the reasonable market price for the gas at the points of delivery for any of the 4-year periods hereinafter listed would be in excess of the price then being paid hereunder, Seller may notify Buyer, not less than eight months prior to the commencement of such period, of the price to be paid by Buyer hereunder during such period and until a subsequent determination by Seller in accordance herewith is made effective. Any price so determined and fixed shall be not less than 21.4¢ per Mcf and not more than:

23.4 Cents per MCF.....From November 1, 1962 to November 1, 1966

25.4 Cents per MCF.....From November 1, 1966 to November 1, 1970

27.4 Cents per MCF.....From November 1, 1970 to November 1, 1974

29.4 Cents per MCF.....From November 1, 1974 to November 1, 1978;

and in the event the term of this contract is extended hereunder beyond November 1, 1978, then not more than

31.4 Cents per MCF.....From November 1, 1978 to November 1, 1982

33.4 Cents per MCF.....From November 1, 1982 to November 1, 1986

[fol. 579] 27

Exhibit "A".

35.4 Cents per MCF ..... From November 1, 1986 to the expiration of this contract.

Except as altered hereinabove, the provisions of Section 10, *Prices,* shall remain unaffected and in full force and effect.

(C) The certificates issued herein shall be accepted in writing and under oath by each of the CATCO parties, each of whom shall be authorized to commence service upon acceptance and upon completion of construction of the "offshore facilities" by Tennessee Gas. Each acceptance shall be accompanied by a resolution of the Board of Directors of the accepting company duly authenticated indicating the approval of the acceptance of the certificates hereby granted.

(D) The certificates issued herein are not transferable and shall be effective only so long as each CATCO company continues the acts or operations hereby authorized in accordance with the provisions of the Natural Gas Act, and the applicable rules, regulations and orders of the Commission.

(E) The grant of the certificates herein shall not be construed as a waiver of the requirements of Section 4 of the Natural Gas Act, or of Part 154 of the Commission's Rules and Regulations thereunder requiring the filing of rate schedules for the services herein authorized; and is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against the CATCO companies. Further, our action in this proceeding shall not foreclose nor prejudice any future proceedings or objection relating to the operation of any price or related provision in the gas purchase contracts herein involved.

Exhibit "A".

(F) The findings of fact and the conclusions of the presiding examiner are hereby adopted except where inconsistent with this order.

(G) Our order issued May 20, 1957, is hereby modified to the extent that it is inconsistent with this order.

By the Commission. Commissioner Connole dissenting.

J. H. Gutride,
Joseph H. Gutride,
Secretary.

In the Matters of Continental Oil Company, *et al.*	Docket No. G-11,024, *et al.*

(Issued June 24, 1957.)

Connole, Commissioner, *dissenting:*

The manifest unwillingness of the producers here involved to submit to properly constituted public authority the prices at which they propose to make these significant sales in interstate commerce has precipitated a crisis for consumers and Commission far out of proportion to the importance of the immediate proceeding. The depth of the crisis was well expressed at the oral argument of June 12, 1957. Producers represented that unless we abandoned our position in this matter it would be their decision to withdraw this gas from the interstate market. Representatives of consuming interests and of metropolitan distributing companies contended it would be preferable to risk curtail-

ment of expansion and, by necessary implication, certainty of supply rather than to permit the Commission to depart from the position taken in our prior Orders in this docket.

This proceeding is another example of the manner in which the skyrocketing demand for natural gas is severely straining the industry's price structure. Demand threatens to elevate price levels beyond customer tolerance. As a result each proposed sale at new high price levels must be evaluated with particular care. Avoiding the disastrous consequences of a collision between consumers' needs for additional gas and producers' demands for additional compensation is particularly difficult in this proceeding because producers have presented the Commission with an almost classic Hobson's choice. In addition, the issues have become expanded in scope and effect until far more than the initial price level of this particular sale is involved. As I see it, the validity of the Commission's judicially approved right to attach a rate condition to certificates of public convenience and necessity when it is called for, and in fact, the very inviolability of all Commission orders is at issue here.

It is clear from the history of this proceeding that we have made unprecedented efforts to ensure fair treatment, that we have clearly evidenced our intention to cooperate in arriving at an initial price level that would be just and reasonable to all parties affected. Despite these efforts, however, the producers remain adamant. Despite ample administrative and judicial authority to the contrary[1] they insist that a proposal to make a sale of natural gas in interstate commerce is not subject to regulatory review to determine if the public interest requires that it be made at the prices proposed.

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[1] See *Cities Service Gas Co., Signal Oil and Gas Co.*, 14 F. P. C. Opinion No. 288, Nos. G-2569, G-2570, November 28, 1955, affirmed as *Signal Oil and Gas Co.* v. *F. P. C.*, 238 F. 2d 771 (CA3), *certiorari* denied 353 U. S. 923.

Exhibit "A".

The record is plain that the controlling reason the parties refuse to submit their contracts to regulatory review in the manner found to be necessary in the public interest is their preference for a proceeding in which the burden would be on the Commission to establish that the rate was more than reasonable. They flatly refuse to submit to one in which the parties would be required to show only that the rate was required by the public convenience and necessity. No citation of authority or reference to regulatory theory is needed to demonstrate that the burden of showing the public convenience and necessity requires a proposed service at a particular price level is on the party seeking to take advantage of the proposed service and not on the tribunal before which the case is to be made. Under the unique conditions found here, the critical importance of that decision is indisputable.

So much has been said in other forums, so many and so unanimous are the authorities in support of it, that to argue the validity and equity of the procedure contemplated by our prior Orders and supported by the *Signal Oil* case, *supra*, would serve no useful purpose now. At this tardy date the unbeliever needs inspiration, not persuasion, if the veil of obstinacy is to be removed from his eyes.

Of more immediate consequence, however, is the dilemma into which the refusal has placed this Commission and the consumers whose interest we must protect: Denial of essential supplies on the one hand, and on the other, inadequate protection against unjust and unreasonable rates.

It contributes nothing to argue that the issue here is sanctity of contract. When it applies, no one feels the force of that argument more keenly than I. And when it was threatened, I spoke out against it. For example, see my separate statement *In the Matters of American Louisana*

[fol. 583] 31

Exhibit "A".

Pipe Line Company, et al., G-10396, *et al.*, issued January 11, 1957.

But no contract terms are involved here. No party questions the manner in which the other has carried out its part of a bargain. If anything, an essential party to the contracts has been crowded out of the bargaining table. And rather than to permit the public interest a place, the bargainers would turn the table upside down and walk away from the entire proceeding.

Plain facts are that the gas has been placed on the interstate market on one set of terms and one only. This Commission and the consumers who have made irrecoverable investments in order to use it, are given no choice but to accept. The arbitrary nature of this position appears from an examination of the orders which have been rejected by the producers.

No voice has been raised to dispute the facts that were set out so clearly in our Order of April 22, 1957. To my legal understanding, they are still facts. A few sentences will illustrate (page 2, mimeo):

> "The record contains insufficient evidence or testimony however, on which to base a finding that public convenience and necessity requires the sale of these volumes of gas at the particular rate level here proposed. The importance of this issue in certificating this sale cannot easily be over-emphasized. This is the largest reserve ever committed to one sale. This is the first sale from the newly developed offshore fields from which large proportions of future gas supplies will be taken. This is the highest price level at which the sale of gas to Tennessee Gas has been proposed.
>
> "These factors make it abundantly evident that, in the public interest, this crucial sale should not be

permanently certificated unless the rate level has been shown to be in the public interest. * * *"

No effective objection has been made to our Order of May 20, 1957. The upper limit of the price range used by the Commission in that Order was set by the contracts themselves which the record discloses contain the highest of at least four bid prices. The lower limit was urged by disinterested public authority intervenors and supported by evidence of record showing, among other things, that it was the highest price presently being paid by Tennessee Gas for the purchase of any gas produced in the Southwest area. Effectively, the Order provided a floor which the rates would not penetrate, an assurance notably lacking in the Section 5(a) procedure so zealously embraced by the applicants. And still the refusal persists.

Nothing but threats by the producers supports the proposition that this gas would be barred forever from the interstate market. And the very quantity of offshore gas affected by this decision makes it clear that the only practical market for gas of this kind for years to come is to the large consuming areas served by the long haul interstate pipelines. In my judgment the pricing pattern should not be set for so crucial a supply source in an atmosphere charged with urgency and in response to arguments whose primary motivation is private, not public, gain. The election by the producers to reject their public responsibility and insist on exercising the full strength of their bargaining position has altered completely the impact of logical and equitable arguments.

The decision of the majority is justifiable only by the evil consequences of the loss of these reserves to the particular pipeline which is a party to the contracts. Such evils would, in the opinion of the majority, exceed the gain to follow from the proof that the public convenience and

[fol. 585]

Exhibit "A".

necessity does not require the sale of this gas at proposed rates.

In my opinion, the consequences of abandoning our position will be more serious than their effect on this particular sale. Whether by design or accident, the issues in this proceeding now transcend the close limits of the original hearing. At stake is the question whether the Commission should hold a position which it has determined is in the long run public interest, or whether it should abandon it when confronted with allegations that short run injury to one segment of the industry and consumers might result. Where the issue is reduced to this simple statement, the answer is clear.

Majority quite properly are concerned that persisting in either our April 22 or our May 20 Order will result in cancellation of the CATCO-Tennessee contracts. I agree it probably would. And quite understandably the majority refuses to permit a few distributing companies and one Public Service Commission to dictate the interests of all other consumers on Tennessee's lines. Unfortunately, however, there is more to this issue.

As concerned as I am for Tennessee's customers, I am more concerned for the whole body of consumers on *all* transmission pipe lines for whose protection we are responsible. And as deserving of preservation as I believe those particular Orders to be, I believe the principle that Federal Regulatory Orders should not be changed by threats of abandoning public responsibility is even more important.

On balance, and in view of the expansion of the issues beyond those originally contemplated by this docket, I believe it more important to the public interest to preserve the Commission's authority to make lawful and necessary orders than it is to preserve these contracts as written. The right to maintain valid orders against allegations of

urgency, the importance to the consumer of the *Signal Oil* doctrine, and the right of *all* consumers for protection against unreasonable initial rates outweigh the potential damage to the consumers of Tennessee Gas Transmission which might flow from maintaining the position I urge here.

While dissenting may appear to serve no useful purpose, the damage to consumer and to the public interest, to the regulatory process, and to the future of the interstate natural gas business as it is given me to discern it, would be such under the majority decision that, inevitable as that decision may appear to be, I am left no choice but to protest it by filing a dissenting vote.

I dissent from the action of the majority in this cause.

.....

William R. Connole, Commissioner

[fol. 587] 35

Exhibit "B".

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

IN THE MATTERS *of* CONTINENTAL OIL COMPANY, THE ATLANTIC REFINING COMPANY, CITIES SERVICE PRODUCTION COMPANY, TIDEWATER OIL COMPANY.	Docket No. G-11024 Docket No. G-11034 Docket No. G-11046 Docket No. G-11049

APPLICATION OF THE LONG ISLAND LIGHTING COMPANY FOR REHEARING.

The Long Island Lighting Company (Long Island), pursuant to the provisions of Section 19(a) of the Natural Gas Act and the Commission's Rules of Practice and Procedure, hereby makes application for rehearing of the Commission's Findings and Order issued June 24, 1957, in the above entitled proceedings.

In support of its said Application Long Island shows the following:

I.

The Long Island Lighting Company supplies gas service to approximately 300,000 customers within a territory consisting of the former Fifth Ward of the Borough of Queens, New York City, and the Counties of Nassau and Suffolk on Long Island in New York State.

Long Island is a customer of Tennessee Gas Transmission Company and obtains a portion of its natural gas supply from Tennessee as authorized by this Commission.

Exhibit "B",

III.

Long Island as a customer of Tennessee is vitally interested in the effect on Tennessee's rates of the gas purchases Tennessee proposes to make from the applicants in this proceeding at the prices and contract conditions set forth in Tennessee's contracts with these applicants. As Long Island obtains the balance of its natural gas not obtained from Tennessee from another pipeline supplier which purchases gas to supply its customers in the same Gulf Coast area of Louisiana as Tennessee, Long Island is also concerned with the effect that the high prices Tennessee proposes to pay these applicants will have on the price of additional pipeline purchases of gas in the Gulf Coast area.

IV.

By order issued by this Commission on February 27, 1957, Long Island was allowed to intervene in this proceeding and did actively participate in the entire proceeding by being represented at the hearings, by filing an initial and reply brief, by filing exceptions to the Examiner's decision and an answer to applicants' motions to modify the Commission's original order issued April 22, 1957, and by being represented by counsel at the oral argument before the Commission on June 12, 1957.

V.

The Commission in modifying its order issued May 20, 1957, by the issuance of its order of June 24, 1957, is in error.

The basic issue in a certificate proceeding is whether the proposed service is in the public interest. The courts have held repeatedly that the primary purpose of the Natural Gas Act is the protection of consumers. This basic

purpose of the Act cannot be fulfilled in producer certificate cases unless the Commission, in determining whether the proposed service is in the public interest, considers not only the need for the additional gas to be supplied, but also the effect of the proposed service on the pipeline's rates.

This Commission in a producer certificate proceeding cannot lawfully grant permanent certificates to the producer applicants unless the rate level at which the proposed service is to be rendered has been shown by competent evidence to be in the public interest.

In this proceeding this Commission itself has twice found that the record contains insufficient evidence or testimony on which the Commission can base a finding that public convenience and necessity requires the sale of the volumes of gas by the producer applicants herein at the particular rate level here proposed.

In its order of April 22, 1957, the Commission said in part:

> "'The record contains insufficient evidence or testimony, however, on which to base a finding that the public convenience and necessity requires the sale of these volumes of gas at the particular rate level here proposed. The importance of this issue in certifying this sale cannot easily be overemphasized. This is the first sale from the newly developed offshore fields from which large proportions of future gas supplies will be taken. This is the highest price level at which the sale of gas to Tennessee Gas has been proposed.
>
> These factors make it abundantly evident that, in the public interest, this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest. See *Cities Service Gas Co., Signal Oil and Gas Co.*, 14 F. P. C. , opinion No. 288, Nos. G-2569, G-2570, No-

vember 28, 1955, affirmed as Signal Oil and Gas Co. *v.* F. P. C., 238 F. 2d 771 (CA 3), certiorari denied, 353 U. S. 923. * * *"

Again in its May 20, 1957 order in referring to the proposed initial price of 21.4 cents per M. C. F. plus one cent Louisiana gathering tax, this Commission said:

> "As we have already stated, the record does not contain sufficient evidence on which to base a finding that the public convenience and necessity requires the sale of the gas at that particular rate level."

Absent sufficient evidence on which the Commission can base a finding that the public convenience and necessity requires the sale of the gas by these applicants at the proposed rates, this Commission cannot lawfully determine that the proposed service is in the public interest and grant permanent certificates of public convenience and necessity to the producer applicants as it has done by its June 24, 1957 order.

The Commission is in error in finding and concluding in its order of June 24, 1957 as follows:

> "In the present status of the case we are left with the difficult problem of how to assure the delivery of this gas to the large market served by Tennessee Gas, and at the same time protect the consumers from an unreasonably high price. In reaching a solution to this problem we are moved by the primary consideration that the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas. Further, it appears to us, important as is the issue of price, that as far as the public is concerned, the predise charge that is made initially is less important than the assurance of this great supply of gas. In view of these circumstances

and the fact that the record does not show that the 21.4 cent rate is necessarily excessive, we agree with the presiding examiner that this certificate proceeding under Section 7 of the Natural Gas Act should not assume the character of a rate proceeding under Section 5(a). We are of the opinion that, in the circumstances of this case, in view of the great demand for gas by customers of Tennessee Gas, the price considerations should not be made the prime determinant of what the public convenience and necessity require. * * *"

The Commission as a matter of law cannot grant these producer applicants permanent certificates upon a determination based entirely on a claimed need for additional natural gas by Tennessee's customers. A proper and lawful certificate can only be granted under the Natural Gas Act on a determination based on adequate evidence that the applicants are able and willing to furnish the proposed service, the proposed sales of natural gas to Tennessee are required, *and* that the rates under which the proposed service will be rendered are in the public interest. The Commission cannot, as it has done by its order of June 24, 1957, ignore or postpone its determination of the issue of the proposed price and grant these applicants permanent certificate solely upon a showing that the applicants are able and willing to provide the proposed service and a need for the gas by Tennessee's customers, particularly where, as in this instance, the Commission itself has twice found that the record does not contain sufficient evidence upon which the Commission can determine that the rate level at which the proposed service is to be rendered is in the public interest and required by the public convenience and necessity.

Exhibit "B".

VII.

The Commission is in error in abandoning the position it has taken in its previous orders of April 22, 1957 and May 20, 1957, in the face of the threats of these producer applicants to cancel their contracts with Tennessee and withdraw this gas from the interstate market unless the Commission certificates the service only on the terms demanded by these applicants themselves.

The inevitable result of the Commission's decision is obvious and far reaching. Producer applicants will, under threats to cancel their contracts with pipelines, as these producer applicants have done, demand and set higher and higher initial prices for their gas. On records barren of any evidence upon which a proper determination can be made that the initial price is reasonable and in the public interest, producers will demand the issuance of permanent certificates on their own terms. Always it will be claimed that the need for the additional gas outweighs any consideration of the initial price.

The position taken by the Commission in this proceeding by its June 24th order with respect to its refusal to consider in the certificate proceeding the initial price to be paid these applicants is not only unsound but unlawful in in that it does not provide Tennessee's customers and their consumers with the protection against unreasonable initial prices that is required by the Natural Gas Act.

VIII.

The Commission is in error in assuming as it does by its June 24, 1957 order, that by postponing any decision as to whether the applicants' initial rates are reasonable and in the public interest to the subsequent 5(a) proceedings that it has ordered, Tennessee's customers and their consumers are protected in the manner required by the Natural Gas Act.

[fol. 593] 41

Exhibit "B".

Presumably applicants' rate schedules for the proposed service will not be filed until shortly before their deliveries to Tennessee actually commence in November. At that time the 5(a) investigations which the Commission has ordered will begin. After these investigations are completed, hearings will be held and the Commission's customary procedural process followed resulting finally in a Commission order with respect to the applicants' initial rates. All of this would take time.

As the Commission's order in a 5(a) proceeding with respect to rates speaks only prospectively and not retroactively, the untested initial rates would be in effect from the time when deliveries of gas commenced until the date of the Commission's order. Should the Commission eventually determine that the applicants' initial rates were in fact unjust and unreasonable and order them reduced, the applicants would not be required to make any refunds on deliveries made at the initial contract prices up to the date of the Commission's order. In practical effect this imposes all of the burden of any regulatory lag on the customers of Tennessee and permits the applicants to be paid a rate for their gas delivered to Tennessee which rate the Commission may subsequently determine is unjust and unreasonable.

Furthermore, as Commissioner Connole states in his dissent, the controlling reason why these applicants have demanded the 5(a) procedure ordered by the Commission is their desire to have the burden placed on the Commission or complainants to establish that the applicants' initial rates are more than reasonable, instead of themselves having the burden of establishing that the proposed initial rates are reasonable and in the public interest as the procedure specified in the Commission's order of May 20, 1957, would require.

The Commission itself in the Cities Service-Signal Oil and Gas Co. proceeding by its opinion No. 288 has recognized these weaknesses of the postponing consideration of

the initial price issue in producer certificate proceedings to subsequent 5(a) proceedings. In that opinion the Commission held that the applicant-seller had the burden in a certificate case of proving all elements of its application so that the Commission could conclude that the proposed service was in the public interest and required by the present and future public convenience and necessity. At page 19 of its Opinion No. 288 the Commission clearly stated that a vital element of such proof in a certificate case is concerned with the rates proposed.

By its order of June 24, 1957 the Commission has repudiated its doctrine of the *Signal Oil* case which has been sustained by the courts and denied Tennessee's customers and their consumers the full and adequate protection against unjust and unreasonable initial rates that the Natural Gas Act provides.

In its order of May 20, 1957 the Commission refers to another reason why a 5(a) review of the initial prices may not afford Tennessee's customers and their consumers full protection against an unjust and unreasonable initial price. The Commission in its May 20th order stated:

> "Furthermore, under the provisions of the so-called Harris Bill, if it is enacted into law, the proposed initial price might no longer be subject to adjustment by us."

While the Commission in this proceeding must proceed under the existing law, the Commission is not to be presumed to be unaware of the effect of a proposed bill now before Congress.

By its May 20th order the Commission provided an effective procedure that was fair and equitable to all parties, and provided adequate protection to Tennessee's customers and their consumers, both under the present law and under the proposed Harris Bill if enacted.

[fol. 595] 43

Exhibit "B".

In the event of the enactment of the so-called Harris Bill, the Commission by its order of June 24, 1957 and the 5(a) procedure provided therein, has removed the protection against this very contingency that concerned the Commission as indicated by the above quotation from its May 20th order.

IX.

The Commission is in error in adopting the findings of fact and conclusions of the presiding examiner in this proceeding to the extent that such findings and conclusions have been excepted to by Long Island. In support of this statement reference is made to the exceptions previously filed to the presiding examiner's findings and conclusions by Long Island jointly with The Brooklyn Union Gas Company.

X.

In its June 24 decision, the Commission made this case turn on a finding that Tennessee's customers are so sorely in need of additional gas that regardless of the price, these contracts should be approved. It is respectfully submitted, however, that the record does not support that finding; indeed, the record is strangely silent on that question. The only reference in the record as to Tennessee's customers' need for this gas is the bare statement that Tennessee's purpose in making these contracts was to obtain gas reserves to supply the expansion of Tennessee's markets as shown by its application in Docket G-11,107. No reference was ever made to Tennessee's pending proposal to expand its system to supply an entirely new mid-western market area in competition with other gas pipeline companies. Information available to the Commission elsewhere in its files casts serious doubt on the correctness of this finding. Tennessee cannot be shown on this record to be in bad shape from the point of view of reserves to supply the needs of

its existing customers. The primary reason Tennessee reached for this gas and outbid everybody else was that Tennessee's expansion plans—for new markets to be served by its subsidiary, Midwestern Gas Transmission Company, rather than increased requirements for existing customers—would have depleted Tennessee's reserves to the point where a large additional supply of gas was desirable if it was to serve the expanded needs of its existing customers. Looking at the situation overall, then, this gas is not urgently needed for Tennessee's existing customers but rather because of its proposed expansion into new markets.

Moreover, the Tennessee system has competition for the new mid-western market from other pipelines and they presumably have contracted for the gas requirements of the territory they too wish to serve. If this Commission were in effect to allow each of the competing pipelines to bid up the price of gas in order to secure a supply which will be required by only one of them, the result is double pressure on the purchasing end of the gas market, which can lead only to a repetition of the chaotic markets which the CATCO contracts have already produced.

XI.

The Commission's order of May 20, 1957, issued in this proceeding is a lawful and proper order, fair, equitable and just to all parties to this proceeding and should not be modified.

WHEREFORE, Long Island for the reasons herein set forth respectfully makes application to this Commission for a rehearing in this proceeding.

Respectfully submitted,

LONG ISLAND LIGHTING COMPANY,
By CHARLES E. ELBERT,
Secretary.

Dated at Mineola, New York,
this 23rd day of July, 1957.

[fol. 597] 45

Exhibit "C".

UNITED STATES OF AMERICA

BEFORE THE

FEDERAL POWER COMMISSION

IN THE MATTERS *of* CONTINENTAL OIL COMPANY, THE ATLANTIC REFINING COMPANY, CITIES SERVICE PRODUCTION COMPANY, TIDEWATER OIL COMPANY.	Docket No. G-11024 Docket No. G-11034 Docket No. G-11046 Docket No. G-11049

APPLICATION OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY FOR REHEARING AND MOTION FOR STAY.

EDWARD S. KIRBY
80 Park Place
Newark 1, New Jersey
Attorney for Public Service
Electric and Gas Company

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

IN THE MATTERS *of* CONTINENTAL OIL COMPANY, THE ATLANTIC REFINING COMPANY, CITIES SERVICE PRODUCTION COMPANY, TIDEWATER OIL COMPANY.	Docket No. G-11024 Docket No. G-11034 Docket No. G-11046 Docket No. G-11049

APPLICATION OF PUBLIC SERVICE ELECTRIC AND GAS COMPANY FOR REHEARING AND MOTION FOR STAY.

Public Service Electric and Gas Company (Public Service), intervenor, pursuant to Section 19(a) of the Natural Gas Act, As Amended, and Section 1.34 of the Commission's Rules of Practice and Procedure, hereby applies for a rehearing of the Commission's "ORDER, UPON APPLICATION FOR REHEARING, ADOPTING INITIAL DECISION OF PRESIDING EXAMINER WITH MODIFICATIONS AND CONDITIONS," issued in these proceedings on June 24, 1957. In support hereof Public Service respectfully shows as follows:

1. On June 24, 1957, the Commission issued an order granting permanent certificates of public convenience and necessity to the above-named applicants authorizing the construction and operation of certain facilities and the sale of natural gas to Tennessee Gas Transmission Company (Tennessee) from leases off the coast of Louisiana in the Gulf of Mexico. The order of June 24, 1957, changed and superseded the order of the Commission, issued in these same proceedings on May 20, 1957, which said order in turn changed and superseded the order issued April 22, 1957, in these proceedings.

[fol. 599] 47

Exhibit "C".

In the order of April 22nd, the Commission granted temporary certificates to the applicants and stated that:

> *"The record contains insufficient evidence or testimony, however, on which to base a finding that the public convenience and necessity requires the sale of these volumes of gas at the particular rate level here proposed. The importance of this issue in certificating this sale cannot easily be overemphasized.* This is the largest reserve ever committed to one sale. This is the first sale from the newly developed offshore fields from which large proportions of future gas supplies will be taken. This is the highest price level at which the sale of gas to Tennessee Gas has been proposed.
>
> *"These factors make it abundantly evident that, in the public interest, this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest.* See *Cities Service Gas Co., Signal Oil and Gas Co.*, 14 F. P. C. —Opinion No. 288, Nos. G-2659, G-2570, November 28, 1955, affirmed as Signal Oil and Gas Co. *v.* F. P. C., 238 F. 2d 771 (CA3), certiorari denied, 353 U. S. 923."
>
> (italics supplied)

The Commission remanded the proceedings to the Presiding Examiner to determine at what rate the public convenience and necessity requires the sale of natural gas by Continental Oil Company, The Atlantic Refining Company, Cities Service Production Company and Tidewater Oil Company (CATCO) to Tennessee to be made. The Commission further specified that the burden of proof and the burden of going forward with the presentation of evidence shall be upon the applicants herein, the CATCO companies and Tennessee.

Exhibit "C".

The order of the Commission issued May 20, 1957, changed the order of April 22, 1957, by granting permanent certificates of public convenience and necessity in place of temporary certificates to CATCO, permitting the applicants to sell natural gas to Tennessee and to construct and operate the necessary facilities. This order reiterated the fact that:

> *"As we have already stated, the record does not contain sufficient evidence on which to base a finding that the public convenience and necessity requires the sale of the gas at that particular rate level. * * *"*
> (Italics supplied.)

Accordingly, the Commission conditioned the issuance of the certificates and required each of the CATCO companies to amend its contract with Tennessee so as to provide that the initial price shall be 18¢ per Mcf instead of 22.4¢ per Mcf.

The order issued June 24, 1957, granted permanent certificates to the applicants without any condition affecting the initial price of 21.4¢ per Mcf. Concurrently with this order the Commission issued an investigation of the rates and charges of Cities Service. The order of June 24, 1957, noted that rate investigations were already proceeding with respect to the other three applicants.

In the orders issued April 22nd and May 20th, the Commission clearly found as a fact that the record does not contain sufficient evidence on which to base a finding that the public convenience and necessity requires the sale of the gas at 22.4¢ per Mcf. No evidence has been supplied or introduced since the Commission's orders of April 22nd and May 20th which would cure the fatal defect in the proof and it is, therefore, respectfully submitted that the Commission erred in departing from the findings made in

its two prior orders that the record does not contain sufficient evidence on which to base a finding that the public convenience and necessity requires the sale of the gas at the rate level proposed. The factors, which the Commission found made it abundantly evident that in the public interest this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest, remain unchanged and still require the applicants to prove that their applications are in the public interest.

2. The applicants failed to meet the requirements for the issuance of certificates of convenience and necessity in that they failed to present probative evidence that the proposed sale is or will be required by the present or future public convenience and necessity in accordance with Section 7(e) of the Natural Gas Act.

3. The Commission erred in relieving the applicants of the burden of proof and the burden of going forward with the presentation of evidence on the issue of the rate at which the public convenience and necessity requires the sale to be made. The substitution of Section 5(a) proceedings does not protect the customers of Tennessee nor the consuming public because the applicants are permitted to charge the contract price of 22.4¢ with no provision for repayment of any overcharges which might subsequently be determined.

At the proposed delivery rate of 240,000 Mcf per day, the annual payments by Tennessee to the CATCO group at the 22.4¢ price would be in excess of $19,600,000; at an 18¢ price, the annual payments would be slightly under $15,800,000, or a difference of $3,850,000 annually. The customers of Tennessee and the consuming public will, as a result, be unlawfully deprived of approximately $3,850,000 per year for some years to come. It is well known that rate investigations are time consuming and in the instant

proceedings the applicants have represented to the Commission that they could not present sufficient evidence in justification of the rate within any reasonable period of time in the future. If the applicants themselves are faced with this dilemma, certainly the Commission's Staff and this intervenor would be faced with even greater difficulty, to the detriment of the ultimate consumers of the natural gas and an unlawful windfall to the producer applicants will result. Certificate applications which contain such inherent defects as to require immediate institution of a rate investigation and under which the applicants are relieved of their statutory burden of proof are unlawful and certainly not in the public interest. Section 5(a) proceedings applied to certificate applications do not adequately protect consumers within the meaning and intent of the Natural Gas Act.

4. The record in these proceedings does not contain competent material and relevant evidence which supports the finding of the Commission that the public served through the Tennessee system is greatly in need of increased supplies of natural gas.

5. The Commission erred in adopting the findings of fact and the conclusions of the Presiding Examiner that the applicants had proved by competent evidence that they are able and willing properly to do the acts and to perform the service proposed, and to conform to the provisions of the Natural Gas Act and the applicable rules, regulations and orders of the Commission.

6. The Commission erred in that it did not attach a rate condition to the certificates which the present and future public convenience and necessity required the Commission to do, based on the record and the law as set forth in the matters of *Cities Service Gas Company and Signal Oil and Gas Company*, Docket Nos. G-2659 and G-2570, affirmed 238 F. 2d 771, certiorari denied 353 U. S. 923.

Exhibit "C".

7. The absence of competition among the four sellers as disclosed by the record imperatively requires the exercise by the Commission of its power to impose a rate condition which will assure that the services authorized will be initially rendered under reasonable rates. It would only be by coincidence that the Commission will ultimately find that the cost of service for the four companies requires the establishment of identical rates of 22.4¢ per Mcf. The order of the Commission issued June 24, 1957, assumes without any proof whatsoever that this most unlikely coincidence exists.

8. The Commission erred in not imposing a rate condition because the actual price which Tennessee will be obligated to pay cannot be determined from the evidence for the reasons that:

(a) In addition to the stated initial price of 22.4¢ per Mcf, Tennessee will be required to spend over $16,000,000 in order to construct the gathering facilities.

(b) The record does not contain any evidence from which it can be determined what operating expenses will be incurred by Tennessee.

(c) Tennessee is required by the contracts to transport liquefiable hydrocarbons for the applicants at no charge.

(d) Tennessee is obligated to construct up to 40 miles of additional pipe line per year.

(e) Another condition in the contracts permits the applicants to deliver to Tennessee the higher priced off-shore gas from the CATCO fields in lieu of the cheaper gas presently dedicated to Tennessee from the West Delta area.

9. The Commission erred in adopting the Examiner's findings that the contracts were entered into as a result of arms-length bargaining and failed to properly inquire into the relationship between the applicants concerning the

negotiations leading to the contracts to sell the gas in question.

10. The Commission erred in that it adopted the Examiner's finding that the effect of the proposed service on Tennessee's rates is not an issue to be considered in this certificate proceeding.

11. The Commission erred in that it gave consideration to the representations of the applicants at the oral argument held on June 12, 1957, that they were unwilling to carry the burden of proof as to price and in the event any price conditions were imposed such as were contained in the prior orders of April 22nd and May 20th, that they would not sell the gas to Tennessee nor even in the interstate market.

WHEREFORE, Public Service respectfully requests that the Commission grant this Application for Rehearing as requested by this intervenor and pending such action stay the effectiveness of its order issued June 24, 1957.

Respectfully submitted,

PUBLIC SERVICE ELECTRIC AND GAS COMPANY

BY:

(Signed) EDWARD S. KIRBY
Edward S. Kirby
Attorney for Public Service
Electric and Gas Company.

Dated: Newark, New Jersey
July 19, 1957.

Exhibit "D".

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION.

Before Commissioners:

Frederick Stueck, Acting Chairman; Seaborn L. Digby, William R. Connole and Arthur Kline.

IN THE MATTERS *of* CONTINENTAL OIL COMPANY, THE ATLANTIC REFINING COMPANY, CITIES SERVICE PRODUCTION COMPANY, TIDEWATER OIL COMPANY.	Docket No. G-11024 Docket No. G-11034 Docket No. G-11046 Docket No. G-11049

ORDER DENYING APPLICATIONS FOR REHEARING.

(Issued August 15, 1957.)

On July 23, 1957, Public Service Electric and Gas Company, The Long Island Lighting Company, and the New York Public Service Commission, and on July 24, 1957, Lake Shore Pipe Line Company, have filed applications for rehearing under Section 19 (b) of the Natural Gas Act of our order issued June 24, 1957. In that order upon rehearing, we reversed and set aside our previous orders of April 22, 1957, and May 20, 1957, and adopted, with certain modifications, the initial decision of the presiding examiner granting certificates of public convenience and necessity to Continental Oil Company, The Atlantic Refining Company, Cities Service Production Company, and Tidewater Oil

Company (CATCO), for the sale of natural gas from their offshore platforms in the Gulf of Mexico to Tennessee Gas Transmission Company. We noted that rate investigations had been instituted against Continental Oil, Atlantic and Tidewater, and contemporaneously with our order we instituted a rate investigation against Cities Service. The certificates issued by our June 24 order have been accepted by all four companies.

The applications do not set forth any contentions or other matter that was not considered by us in connection with our June 24, 1957, order except that the Long Island Lighting Company objects to our adopting the findings of fact and conclusions of the presiding examiner in certain respects. Upon considering this matter further we are of the opinion that our order properly stands upon our own discussion of the facts. Therefore it will not be necessary to adopt the presiding examiner's conclusions on the facts except for the ultimate result of issuing the certificates. We do adopt, however, his recital of the facts.

The Commission finds:

The applications for rehearing of our order issued on June 24, 1957, in this proceeding, except as stated above, set forth no new facts and no principles of law which either were not fully considered by the Commission when it issued that order or which having now been considered warrant any change in or modification of such order. All contentions and objections not specifically discussed or referred to herein have been considered and found either without basis in law or support in fact, but are not sufficiently material to warrant individual treatment or have been adequately disposed of otherwise.

[fol. 607] 55

Exhibit "D".

The Commission orders:

(A) The above applications for rehearing filed on July 23 and 24, 1957 with respect to our order of June 24, 1957, are hereby denied.

(B) In place of ordering Clause (F) of our order of June 24, 1957, we adopt the recital of facts made by the presiding examiner and his conclusion that certificates of public convenience and necessity should be issued to the CATCO companies.

By the Commission. Commissioner Connole dissenting.

J. H. GUTRIDE,
Joseph H. Gutride,
Secretary.

Exhibit "E".

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners:

Jerome K. Kuykendall, Chairman; Seaborn L. Digby, William R. Connole and Arthur Kline.

IN THE MATTERS *of* CONTINENTAL OIL COMPANY, THE ATLANTIC REFINING COMPANY, CITIES SERVICE PRODUCTION COMPANY, TIDEWATER OIL COMPANY, TENNESSEE GAS TRANSMISSION COMPANY.	Docket No. G-11024 Docket No. G-11034 Docket No. G-11046 Docket No. G-11049 Docket No. G-11107

FINDINGS AND ORDER ISSUING TEMPORARY CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY.

(Issued April 22, 1957)

Continental Oil Company on September 5, 1956, The Atlantic Refining Company on September 7, 1956, and Cities Service Production Company and Tidewater Oil Company on September 10, 1956 (together termed CATCO) have filed applications pursuant to Section 7 of the Natural Gas Act for a certificate of public convenience and necessity authorizing the sale of gas from their leases off the coast of Louisiana to Tennessee Gas Transmission Company. On its part, Tennessee Gas has filed an application for a certificate of public convenience and necessity on September 19, 1956, as amended March 1, 1957, for authority,

Exhibit "E".

among other things, to construct and operate facilities for the transportation of gas from the offshore platforms owned by CATCO to a point on its main pipeline system at Kinder, Louisiana. The presiding examiner's decision issued March 29, 1957, would grant certificates to CATCO, without imposing a rate condition but with a condition that a certificate be issued to Tennessee Gas for the necessary facilities.

Exceptions were filed by interveners New York Public Service Commission, Long Island Lighting Company, Lake Shore Pipe Line Company, and Public Service Electric and Gas Company objecting to the rate proposed and requesting a rate condition, and by CATCO, objecting to the requirement that a certificate be granted to Tennessee Gas unless a temporary certificate would satisfy this condition.

The record shows that the four producer companies each owns a quarter interest in gas leases located some 12 to 25 miles off the coast of Louisiana in the Gulf of Mexico, in the East Cameron, West Cameron, and Vermilion areas, totalling some 95,000 acres and containing reserves of some 1,673,929,000 Mcf including 430,000,000 Mcf untested by conventional methods. In this offshore field the four companies own platforms, wells, separators, and meters, but no pipelines. To connect with the offshore wells, Tennessee Gas proposes to build some 46 miles of 26-inch line from its main line at Kinder, Louisiana, to the shore, and some 61 miles of 26-inch, 20-inch, 16-inch, and 12-inch line thence to the platforms at an estimated cost of $16,315,412.

The sales of gas will be made to Tennessee Gas at the offshore platforms under the terms of separate contracts executed in August of 1956, all of whose basic provisions are identical, providing that Tennessee Gas must accept 175,000 Mcf or four-fifths of the total quantity which the wells are capable of producing, whichever is the lesser, until November 1, 1958. After that it will be required to

take and pay for 1,000 Mcf for every 8,000,000 Mcf of recoverable gas originally in place in the dedicated reserves. The testimony showed that the reserves were adequate to meet contract deliveries.

The initial price which would be paid by Tennessee Gas under each of the contracts, is 22.4 cents per Mcf (including one cent per Mcf for the Louisiana gathering tax) until November 1, 1962. Thereafter, the price would escalate by two cents per Mcf every four years until the contract in question expires. The record shows that the 22.4-cent price is higher than Tennessee Gas is paying under any other contract. It is this price, with the provision for escalation, to which the interveners have made vigorous objections in exceptions to the presiding examiner's decision, which would grant a certificate without a rate condition attached to it. They contend that if the rate were allowed to stand it would establish a higher-price plateau in a new area to the detriment of consumers.

The record contains insufficient evidence or testimony, however, on which to base a finding that the public convenience and necessity requires the sale of these volumes of gas at the particular rate level here proposed. The importance of this issue in certificating this sale cannot easily be overemphasized. This is the largest reserve ever committed to one sale. This is the first sale from the newly developed offshore fields from which large proportions of future gas supplies will be taken. This is the highest price level at which the sale of gas to Tennessee Gas has been proposed.

These factors make it abundantly evident that, in the public interest, this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest. See *Cities Service Gas Co.*, Signal Oil and Gas Co., 14 F. P. C. , opinion No. 288, Nos. G-2569,

[fol. 611]

Exhibit "E".

G-2570, November 28, 1955, affirmed as *Signal Oil and Gas Co.* v. *F. P. C.*, 238 F. 2d 771 (CA3), certiorari denied, 353 U. S. 923.

The examiner has found there is a need for those volumes of gas on the system of Tennessee Gas, and that the applicants are ready and able to deliver them and take them, respectively. These findings we adopt. They argue conclusively that the sale is necessary in the public interest. All that remains for disposition is a determination as to the rate level at which the public convenience and necessity requires them to be made. Compelling reasons prevent us from postponing making these volumes available, however, until such time as the determination has been made.

The contracts between CATCO and Tennessee Gas provide November 1, 1957, as the date for commencing service, and in order to comply with the leases and the Louisiana Shelflands Act, production should commence by 1958. To meet this schedule Tennessee Gas must build its underwater pipelines before the onset of the season of bad weather. In view of this total situation we are disposed at this time to grant temporary certificates to CATCO for the sale of gas and to Tennessee Gas as requested by it for its proposed 107 miles of connecting pipelines.[1] At the same time, we shall remand the CATCO proceedings to the presiding examiner to determine at what rates the public convenience and necessity requires these sales to be made if permanent certificates are to be granted to these companies upon final disposition of their applications. By the procedures adopted here, however, we do not necessarily imply that the rates at which the proposed sales would be made are not in the public interest.

---

[1] By letter of March 29, 1957, Tennessee Gas was granted a temporary certificate for facilities covered by the same application in docket No. G-11107, but specifically excluding the 107 miles of pipeline referred to here.

Exhibit "E".

The Commission finds:

(1) Continental, Atlantic, Tidewater, and Cities Service, independent producers of natural gas with respect to the sales here involved, upon commencement of the sales authorized herein, will be engaged in the sale of natural gas in interstate commerce for resale for ultimate public consumption, subject to the jurisdiction of the Commission, and each will, therefore, be a "natural-gas company" within the meaning of the Natural Gas Act, if not already in this status because of other transportation or sales.

(2) The sales of natural gas by CATCO hereinbefore described, as more fully described in the applications, will be made in interstate commerce, subject to the jurisdiction of the Commission, and such sales by CATCO, together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

(3) Tennessee Gas is engaged in the transportation of natural gas in interstate commerce and the sale of natural gas in interstate commerce for resale for ultimate public consumption subject to the jurisdiction of the Commission, and, therefore, is a "natural-gas company" within the meaning of the Natural Gas Act as heretofore found by the Commission.

(4) The facilities to be constructed by Tennessee Gas as hereinbefore described are proposed to be used in the transportation and sale of natural gas in interstate commerce, subject to the jurisdiction of the Commission, as an integral part of Tennessee Gas' existing pipeline system, and the construction and operation thereof by Tennessee Gas are subject to the requirements of subsections (c) and (e) of Section 7 of the Natural Gas Act.

[fol. 613] 61

Exhibit "E".

(5) To assure maintenance of adequate service and to serve Tennessee Gas and its customers, the public convenience and necessity requires that temporary certificates be issued to CATCO and Tennessee Gas as hereinafter ordered.

(6) It is necessary and appropriate in the administration of the Natural Gas Act that the proceedings in docket Nos. G-11024, G-11034, G-11046, and G-11049 be remanded to the presiding examiner to make the determination required in (D) below.

(7) To the extent that the exceptions above referred to are inconsistent with the Commission's order herein, they should be denied.

The Commission orders:

(A) A temporary certificate of public convenience and necessity is hereby issued to CATCO authorizing the sale of natural gas to Tennessee Gas, from CATCO's leases in the East Cameron, West Cameron and Vermilion areas off the coast of Louisiana in the Gulf of Mexico, together with the construction and operation of any facilities, subject to the jurisdiction of the Commission, used for such sale, as hereinbefore described and as more fully described in the applications in this proceeding.

(B) A temporary certificate of public convenience and necessity is hereby issued authorizing Tennessee Gas to construct and operate approximately 107 miles of pipeline to transport natural gas from the offshore platforms of CATCO to Tennessee Gas' main system at Kinder, Louisiana, as hereinbefore described and as more fully described in its application.

(C) The temporary certificates issued herein shall be without prejudice to such final disposition of the applica-

Exhibit "E".

tions of CATCO and Tennessee Gas as the record may require.

(D) The proceedings in Docket Nos. G-11024, G-11034, G-11046, and G-11049 shall be remanded to the presiding examiner to determine at what rate the public convenience and necessity requires the sale of natural gas by CATCO to Tennessee Gas to be made if these CATCO companies are granted permanent certificates of public convenience and necessity.

(E) In proceedings conducted in accordance with the requirements of paragraph (D) above the burden of proof and the burden of going forward with the presentation of evidence shall be upon the applicants herein, the CATCO Companies and Tennessee Gas.

(F) The certificates of public convenience and necessity issued herein are conditioned upon the receipt by the Commission within 15 days of the issuance of this order of letters signed by a duly authorized official of each of the CATCO Companies and Tennessee Gas, unconditionally accepting the temporary certificates hereby granted under the conditions herein stated.

(G) Exceptions filed with respect to the initial decision of the presiding examiner which are inconsistent with our action herein are hereby denied.

By the Commission.

J. H. Gutride,
Joseph H. Gutride,
Secretary.

Exhibit "E".

IN THE MATTERS *of* CONTINENTAL OIL COMPANY, THE ATLANTIC REFINING COMPANY, CITIES SERVICE PRODUCTION COMPANY, TIDEWATER OIL COMPANY, TENNESSEE GAS TRANSMISSION COMPANY.	Docket No. G-11024 Docket No. G-11034 Docket No. G-11046 Docket No. G-11049 Docket No. G-11107

April 22, 1957.

DIGBY, Commissioner, *concurring:*

I concur completely in the issuance of temporary certificates to the producers and to Tennessee. I also concur in the order reopening and referring the record back to the Examiner to be proceeded with on the applications of the producers for permanent and final certificates of public convenience and necessity to make the sale to Tennessee. I do not believe that the Commission should presume that the final certificates, if and when issued, should be conditioned by prescribing an initial rate.

.....

S. L. DIGBY, Commissioner.

Exhibit "F".

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION.

Before Commissioners:

Jerome K. Kuykendall, Chairman; Seaborn L. Digby, Frederick Stueck, William R. Connole and Arthur Kline.

IN THE MATTERS *of* CONTINENTAL OIL COMPANY, THE ATLANTIC REFINING COMPANY, CITIES SERVICE PRODUCTION COMPANY, TIDEWATER OIL COMPANY.	Docket No. G-11024 Docket No. G-11034 Docket No. G-11046 Docket No. G-11049

FINDINGS AND ORDER ISSUING PERMANENT CERTIFICATES OF PUBLIC CONVENIENCE AND NECESSITY AND MODIFYING PREVIOUS ORDER.

(Issued May 20, 1957.)

On May 6, 1957, Continental Oil Company, The Atlantic Refining Company, Cities Service Production Company, and Tidewater Oil Company (together termed CATCO) filed a document entitled "Application for Rehearing" but in effect requesting modification of the Commission's order of April 22, 1957, issuing temporary certificates of public convenience and necessity to CATCO and Tennessee Gas Transmission Company in docket No. G-11107. Since the order of April 22, 1957, was not a final order and since CATCO's filing did not request a hearing, but rather modification of our order, we shall treat the filing as a mo-

[fol. 617] 65

Exhibit "F".

tion for modification. Answers were filed on May 14, 1957, by Public Service Electric and Gas Company, and on May 16, 1957, by the New York Public Service Commission, Lake Shore Pipe Line Co., Brooklyn Union Gas Company, and Long Island Lighting Company requesting that the Commission deny CATCO's motion, and on May 16, 1957, by Tennessee Gas urging that the motion be granted.

The temporary certificates issued by our order of April 22, 1957, authorized CATCO to sell natural gas to Tennessee Gas from CATCO's leases in the East Cameron, West Cameron and Vermilion areas off the coast of Louisiana in the Gulf of Mexico, and authorized Tennessee Gas to construct and operate approximately 107 miles of pipeline from the offshore platforms of CATCO to a point on its main system at Kinder, Louisiana. The Commission remanded the proceedings to the presiding examiner to determine at what rate the sale of natural gas by CATCO to Tennessee Gas should be made if permanent certificates were to be granted.

By their filing of May 6, 1957, the CATCO companies state that the nature and extent of the economic risk which they have to undergo is such as to foreclose their acceptance of temporary certificates. They say further that they could not present sufficient evidence at the hearing contemplated by the Commission's order within any reasonable period in the future and could not afford to commence construction until at least the initial rate question is resolved.

The CATCO companies urge that if there is no change in existing law the Commission will have continuing control, under Sections 4 and 5 of the Natural Gas Act, over the rate to be charged and any increases proposed. However, if the Harris Bill, H. R. 6790, 85th Congress, or some bill similar to it, becomes law they admit that the Commission might possibly lose continuing supervision over the future price increases provided in the several contracts between

the CATCO companies and Tennessee Gas. To permit the Commission to retain such supervision the CATCO companies propose to amend their contracts so that, if the Harris Bill is enacted into law, the initial sales price shall be 21.4 cents per Mcf[1] until November 1, 1962, as at present, but after that the "reasonable market price" within the meaning of the bill and as determined by this Commission shall prevail; provided, however, that such "reasonable market price" shall be "not less than 21.4 cents per Mcf." Under this proposal, adjustments may be initiated by the sellers at four-year intervals under "indefinite pricing clauses", which would replace the "definite pricing clauses" contained in the contracts but would be limited by the step increases now provided in the contracts. Tennessee Gas states in its answer that it agrees with and fully supports CATCO's proposal and will enter into the proposed amendments to the gas sales contracts of the CATCO companies.

In view of the need for the volumes of gas and the exigencies of the construction schedule to which we adverted in our previous order, we are disposed to modify our order of April 22, 1957, and to grant a permanent certificate to CATCO conditioned upon the amendment of the contracts between them and Tennessee Gas to reflect the modifications of CATCO's proposal in this regard as hereinafter stated. However, this proposal does not go far enough, for it leaves unaffected the 21.4 cents initial sales price. As we have already stated, the record does not contain sufficient evidence on which to base a finding that the public convenience and necessity requires the sale of the gas at that particular rate level. Furthermore, under the provisions of the so-called Harris Bill, if it is enacted into law, the proposed initial price might no longer be subject to adjustment by us. At the same time we realize that any proceeding to determine

---

[1] Reimbursement for the one-cent Louisiana gathering tax would be in addition to this amount.

the proper rate level would so delay the construction schedule as to cause possible forfeiture of the leases. To permit the CATCO companies and Tennessee Gas to proceed with their plan to make available the volume of gas contemplated to be delivered from the offshore leases and at the same time insure that the interests of consumers are protected not only as to the future prices, but as to the initial price, we conclude that permanent certificates should issue to CATCO upon acceptance by it of the condition described below, without remanding the proceedings to the presiding examiner as we had provided.

The condition to the certificates shall be that each of the CATCO companies shall amend its contract with Tennessee Gas so as to provide that the initial price shall be 18 cents per Mcf (including one cent per Mcf for the Louisiana gathering tax). This price, the record shows, is the highest price presently being paid by Tennessee Gas for the purchase of any gas produced in the Southwest area. The contracts shall be further amended to provide that the CATCO companies shall be entitled to file for an increased rate to be effective one day after commencement of deliveries to Tennessee Gas, but such increased rate shall not be in excess of 22.4 cents per Mcf (inclusive of the one-cent Louisiana gathering tax). The contracts shall also be amended to provide that the price so determined and fixed shall be in effect to November 1, 1962, unless changed by the Commission as hereinafter provided, and seller may file for indefinite price increases to be effective on or after November 1, 1962, as provided in the herein proposed amendments to the contracts.

We are not determining that the 18-cent maximum price set herein is the proper price under the standards of the Act as presently constituted or as it might be amended by the Harris Bill. What we are doing is providing a means of protecting the interests of the consuming public while at

the same time giving the producers and the pipeline company an opportunity to go forward with their respective construction programs. Under the present provisions of the Act, we have the power to suspend for a period of five months any proposed increased rates; however, to give further assurances to the producers that they will not be penalized by suspension action, we propose to limit suspension of the initial rate increase filing to a period of 24 hours. Thus, the producers are assured of receiving the proper price under standards of the Act as presently constituted or as they may be constituted at that time.

The Commission finds:

(1) It is necessary and appropriate to modify the Commission's order issued April 22, 1957, in the above-entitled proceeding, in the manner set forth below.

(2) The CATCO companies are able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Natural Gas Act, and the requirements, rules, and regulations of the Commission thereunder.

(3) The sales of natural gas by the CATCO companies to Tennessee Gas, as referred to above, together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, are required by the public convenience and necessity, and permanent certificates therefor should be issued as hereinafter ordered and conditioned.

The Commission orders:

(A) Permanent certificates of public convenience and necessity are hereby issued to the CATCO companies, without further hearing, authorizing the sale of natural gas to Tennessee Gas, from CATCO's leases in the East Cameron, West Cameron and Vermilion areas off the coast of Louisiana in the Gulf of Mexico, together with the construction

and operation of any facilities, subject to the jurisdiction of the Commission, used for such sale, as hereinbefore described and as more fully described in the applications in this proceeding, subject to the conditions set forth below.

(B) Each of the CATCO companies, within 20 days after the issuance of this order, shall file with the Commission a duly executed amendment to Section 10 of the contract submitted as an exhibit to its certificate application providing for sale of natural gas to Tennessee Gas embodying the following language:

> 10. *Prices*—The prices to be paid by Buyer to Seller for all gas delivered to or, if available and not taken by Buyer, to be paid for hereunder, shall be as follows:
>
> From the date of initial delivery, or November 1, 1957, whichever occurs first.....17 cents per Mcf; provided that after the 17-cent price referred to above has been in effect for one day, Buyer agrees that Seller may file with the Federal Power Commission a proposed changed and increased price which shall be not more than 21.4 cents per MCF, and Seller shall be entitled to receive and Buyer shall pay such portion of such increased price as may be allowed by the Federal Power Commission under then applicable statutory standards. The price so allowed by the Federal Power Commission shall continue in effect to November 1, 1962, unless otherwise changed by the Federal Power Commission under applicable statutory provisions. Provided that if Seller should determine that the price determinable under applicable statutory standards for gas at the points of delivery for any of the four (4) year periods hereinafter listed should be in excess of the price then being paid hereunder, Seller may notify Buyer, not less than eight months prior to the commencement of such

period, that Seller proposes to increase the price to be paid by Buyer hereunder during such period and until a subsequent determination by Seller that the price determinable under then applicable statutory standards is in excess of the price then being paid hereunder, and Seller shall be entitled to receive and Buyer shall pay such portion of such proposed increased price as may be allowed by the Federal Power Commission under then applicable statutory standards.

Any price so determined and fixed shall be not less than the price determined and fixed by the Commission under applicable statutory standards and not more than:

23.4 Cents per MCF.....	From November 1, 1962 to November 1, 1966
25.4 Cents per MCF.....	From November 1, 1966 to November 1, 1970
27.4 Cents per MCF.....	From November 1, 1970 to November 1, 1974
29.4 Cents per MCF.....	From November 1, 1974 to November 1, 1978;

and, in the event the term of this contract is extended hereunder beyond November 1, 1978, then not more than

31.4 Cents per MCF.....	From November 1, 1978 to November 1, 1982
33.4 Cents per MCF.....	From November 1, 1982 to November 1, 1986
35.4 Cents per MCF.....	From November 1, 1986 to the expiration of this Contract

Except as altered hereinabove, the provisions of Section 10 shall remain unaffected and in full force and effect.

[fol. 623] 71

Exhibit "F".

(C) The certificates issued herein shall be accepted in writing and under oath within 30 days from the date of issuance of this order and by such acceptance the CATCO parties shall severally and collectively obligate itself and themselves to commence service upon the completion of construction of the "offshore facilities" by Tennessee Gas. Such acceptance or acceptances shall be accompanied by a resolution of the Board of Directors duly authenticated indicating the approval of the acceptance of the certificates hereby granted.

(D) The certificates issued herein are not transferable and shall be effective only so long as each CATCO company continues the acts or operations hereby authorized in accordance with the provisions of the Natural Gas Act, and the applicable rules, regulations and orders of the Commission.

(E) The grant of the certificates herein shall not be construed as a waiver of the requirements of Section 4 of the Natural Gas Act, or of Part 154 of the Commission's Regulations thereunder requiring the filing of rate schedules for the services herein authorized; and is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against the CATCO companies. Further, our action in this proceeding shall not foreclose nor prejudice any future proceedings or objection relating to the operation of any price or related provision in the gas purchase contracts herein involved.

(F) Paragraphs (A), (C), (D), (E), and (F) of the order issued April 22, 1957, insofar as they are inconsistent with the provisions of this order, are hereby modified.

By the Commission.

Commissioner Kline concurring in part.

Commissioner Digby dissenting.

J. H. Gutride,
Joseph H. Gutride,
Secretary.

Exhibit "F".

IN THE MATTERS *of* CONTINENTAL OIL COMPANY, THE ATLANTIC REFINING COMPANY, CITIES SERVICE PRODUCTION COMPANY, TIDEWATER OIL COMPANY.	Docket No. G-11024 Docket No. G-11034 Docket No. G-11046 Docket No. G-11049

(Issued May 20, 1957.)

Kline, Commissioner, *concurring* in part:

I concur solely because I see no other ready solution to the problems presented in this proceeding. I feel that under ordinary circumstances the fixing of initial prices in a sales contract is a matter between the producer and purchaser and that the Commission should not attempt to take over this function. I agree with the Commission action in this case solely because of the unusual situation confronting us.

I cannot concur with the Commission action in one respect. I would provide that the contract be amended as set forth in Paragraph (β) of the Commission order only in the event that the Harris Bill becomes law. I would provide that in the event the bill does not become law the certificate issue at the initial contract price of 21.4¢ per Mcf. The right of the Commission or interveners to invoke Section 5(a) proceedings is sufficient protection to the consumers under existing law.

.....

ARTHUR KLINE, Commissioner

Certificate of Service.

I, Edward S. Kirby, Attorney for Public Service Electric and Gas Company, do hereby certify that I have on this 11th day of October, 1957, served upon each of the following persons a copy of the foregoing petition for review by depositing same in the United States Mail, postage prepaid:

Hon. Jerome K. Kuykendall,
Chairman
Federal Power Commission
441 G. Street, N. W.
Washington, D. C.

Roland B. Voight, Esq.
Continental Oil Company
Box 2197
Houston, Texas

Edward J. Kremer, Jr., Esq.
The Atlantic Refining Company
Box 2819
Dallas, Texas

Bernard A. Foster, Jr., Esq.
Ross, Marsh & Foster
725 15th Street, N. W.
Washington 5, D. C.

Cecil C. Cammack, Esq.
Cities Service Production Co.
Bartlesville, Oklahoma
Gentry Lee, Esq.

Cities Service Production Co.
806 Cities Service Building
Bartlesville, Oklahoma

Gene M. Woodfin, Esq.
Vinson, Elkins, Weems and Searles
11th Floor, Esperson Bldg.
Houston, Texas

Robert O. Koch, Esq.
Tidewater Oil Company
Esperson Building
Houston, Texas

Harry S. Littman, Esq.
Jack Werner, Esq.
Tennessee Gas Transmission Co.
317 Wyatt Building
Washington 5, D. C.

Edwin F. Russell, Esq.
Robert B. Lisle, Esq.
Cullen and Dykman
177 Montague Street
Brooklyn, New York

Thomas F. Ryan, Jr., Esq.
Gallagher, Connor & Boland
821 - 15th Street, N. W.
Washington, D. C.

Kent H. Brown, Esq.
New York Public Service
Commission
55 Elk Street
Albany, New York

Department of Public Utilities
Board of Public Utility
Commissioners
1100 Raymond Boulevard
Newark, New Jersey

Ewing G. Simpson, Presiding
Examiner
Federal Power Commission
441 G. Street, N. W.
Washington 25, D. C.

Robert L. Russell, Esq.
John Paul Geneau, Esq.
Federal Power Commission
441 G. Street, N. W.
Washington 25, D. C.

EDWARD S. KIRBY.

[fol. 627] [File endorsement omitted]

[fol. 628]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12401

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

FEDERAL POWER COMMISSION, Respondent.

MOTION OF TENNESSEE GAS TRANSMISSION COMPANY FOR LEAVE TO INTERVENE—Filed October 12, 1958

To the United States Court of Appeals for the Third Circuit and the Honorable Judges Thereof:

Tennessee Gas Transmission Company (Tennessee) respectfully moves this Honorable Court, pursuant to Rule 18(6), for leave to intervene in opposition to the Petition for Review, to be heard upon briefs and oral argument, and otherwise to participate fully as a party in this proceeding in which Petitioner seeks to have reviewed and set aside an order of the Federal Power Commission. In support of this motion, Tennessee respectfully shows that:

I

Tennessee is a corporation organized and existing under the laws of the State of Delaware with its principal office in [fol. 629] the Commerce Building at Houston, Texas. Tennessee is a natural-gas company within the meaning of the Natural Gas Act (Act of June 21, 1938, c. 556, 52 Stat. 821; 15 U. S. C. §717, *et seq.*). It is engaged in the business of producing, purchasing, transporting and selling natural gas in interstate commerce, under authorizations granted by the Commission. Tennessee's main pipeline system extends in a northeasterly direction from sources of supply in

Texas and Louisiana through the states of Texas, Louisiana, Arkansas, Mississippi, Tennessee, Kentucky, West Virginia, Ohio, Pennsylvania, New Jersey, New York, and into Massachusetts, New Hampshire, Rhode Island and Connecticut.

Movant is the Tennessee Gas Transmission Company referred to in the Petition for Review to whom the gas involved herein is to be sold.

II

The Federal Power Commission order sought to be reviewed intimately concerns Tennessee, and the relief sought by Petitioner would, if granted, have a direct, substantial, and adverse effect upon Tennessee and the customers served by it.

By application filed September 19, 1956, as amended March 1, 1957, Tennessee applied for a certificate of public convenience and necessity pursuant to Section 7(c) of the Natural Gas Act, for authority, among other things, to construct and operate facilities for the transportation of gas from the offshore platforms owned by CATCO[1] to a [fol. 630] point on Tennessee's main line pipeline system at Kinder, Louisiana. By Order of the Commission issued April 22, 1957, as modified by an Order issued May 20, 1957, Tennessee was granted a temporary certificate of public convenience and necessity authorizing it to construct and operate such facilities. The facilities are now under construction and are scheduled for completion by the end of this year. The purpose of these facilities (involving 107 miles of pipeline at an estimated cost of approximately $16,000,000) is to transport the CATCO gas involved herein from the offshore platforms of CATCO to Tennessee's main transmission line for resale to Tennessee customers.

[1] Continental Oil Company, The Atlantic Refining Company, Cities Service Production Company, and Tidewater Oil Company, the applicants in the proceedings before the Commission in which the order under review was issued.

III

Tennessee was a party to the instant proceeding before the Commission and presented evidence as to its need for the CATCO gas in order to serve the expanding needs of the market served by it. Loss of the CATCO gas would have a substantial adverse effect upon Tennessee.

IV

It is the primary purpose of Tennessee in seeking intervention herein to show that there is no merit to the contentions of Petitioner; that the Order under review was proper and in the public interest; that the initial price of which Petitioner complains is the subject of rate investigations instituted by the Federal Power Commission pursuant to Section 5(a) of the Natural Gas Act; and that such rate investigations will adequately protect the consuming public with regard to price of the gas involved herein.

V

[fol. 631] It is, therefore, respectfully submitted that Tennessee has a direct and immediate interest in this review proceeding, which is not represented by any other party.

Wherefore, Tennessee respectfully moves this Honorable Court for leave to intervene in this cause and be made a party thereto in support of the Order here sought to be reviewed, to be heard upon briefs and oral argument, and otherwise to participate fully herein as a party.

Respectfully submitted,

Tennessee Gas Transmission Company, By /s/ Harry S. Littman, 317 Wyatt Building, Washington 5, D.C., Its Attorney.

William C. Braden, Jr., Commerce Building, Houston, Texas.

Harry S. Littman, Jack Werner, 317 Wyatt Building, Washington 5, D.C., Of Counsel.

October 11, 1957

[fol. 632] *Duly sworn to by Harry S. Littman, jurat omitted in printing.*

[fol. 633] [File endorsement omitted]

No. 12,401

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

vs.

FEDERAL POWER COMMISSION, Respondent.

MOTION OF TIDEWATER OIL COMPANY TO INTERVENE IN OPPOSITION TO THE PETITION FOR REVIEW—Filed October 17, 1957

[fol. 634] To the United States Court of Appeals for the Third Circuit and the Honorable Justices Thereof:

Tidewater Oil Company (Tidewater) respectfully moves the Court for permission to intervene herein in opposition to the Petition for Review of the Public Service Commission of the State of New York (Petitioner), and in support of the correctness and binding effectiveness of the orders of the Federal Power Commission (Commission) sought to be attacked by Petitioner, and as required by Rule 18(6) of this Court, shows as follows:

Nature of Tidewater's Interest and Grounds Upon Which Intervention Is Sought

Tidewater Oil Company is an independent producer engaged in the production and sale of natural gas. Tidewater, Continental Oil Company (Continental), Atlantic Refining Company (Atlantic) and Cities Service Production Company (Cities Service) each owns an undivided twenty-five percent (25%) interest in certain leases in the Gulf of Mexico off the shore of Cameron and Vermilion Parishes, Louisiana. Each of the afore-mentioned independent

[fol. 635] producers applied for a Certificate of Public Convenience and Necessity pursuant to Section 7(c) of the Natural Gas Act, 15 U.S.C.A. Section 717f(c) for the sale of natural gas from these leases in the Gulf of Mexico to Tennessee Gas Transmission Company (Tennessee) pursuant to separate contracts between each Seller and Tennessee. Tidewater's application for a Certificate of Public Convenience and Necessity was filed on September 10, 1956, in Docket No. G-11049; Continental's application was filed on September 5, 1956, in Docket No. G-11024; Atlantic's application was filed on September 7, 1956, in Docket No. G-11034; and Cities Service's application was filed on September 10, 1956, in Docket No. G-11046. These applicants are collectively referred to as the CATCO companies. These proceedings were consolidated by order of the Federal Power Commission and were heard on a single record.

Concurrently, by application dated September 19, 1956, Tennessee applied for a Certificate of Public Convenience and Necessity pursuant to 15 U.S.C.A., Section 717f(c) for authority to institute construction of facilities to transport the gas from the offshore locations to the mainland. By [fol. 636] order of the Commission issued April 22, 1957, as modified by an order issued May 20, 1957, Tennessee was granted a temporary Certificate of Public Convenience and Necessity authorizing it to construct and operate such facilities, and pursuant to this certificate it has commenced construction of approximately 107 miles of pipe line from the offshore platforms of the CATCO companies to a point on Tennessee's main transmission line at Kinder, Louisiana.

Pursuant to notice issued February 8, 1957, hearings on the CATCO applications were held February 28, 1957, and concluded the following day. Intervention by various parties including the Petitioner herein was permitted by order of the Commission issued February 27, 1957. Subsequent to the decision of the Presiding Examiner issued March 29, 1957, and intermediate orders of the Commission issued on April 22, 1957, and May 20, 1957, these applications culminated in the Commission's order of June 24, 1957, which issued conditional certificates to each of the CATCO companies. Each of the CATCO companies has complied with the conditions set forth in Paragraphs (B)

and (C) of the order issued by the Commission on June 24, 1957. Tidewater complied with the conditions by filing [fol. 637] with the Commission within twenty (20) days after the issuance of said order an amendment to its contract with Tennessee and a corporate resolution authorizing such amendment. Petitioner's application for a rehearing of the June 24th order was denied by the Commission's order issued April 15, 1957.

The order from which the Petitioner appeals arose from proceedings before the Commission in which the Petitioner was an intervenor in opposition to Tidewater's application for a Certificate of Public Convenience and Necessity. Tidewater was a party to said proceedings and presented evidence in support of its application for such certificate. In its Petition for Review the Petitioner, inter alia, prays:

> "That said proceedings and the decision and order issued therein on June 24, 1957, be reviewed by this Court; that said order be set aside, vacated and annulled in its entirety and the proceeding be remanded to the respondent Federal Power Commission."

If the order issued by the Commission on June 24, 1957, is set aside as requested in that part of Petitioner's prayer set out above, there would be a substantial adverse effect upon Tidewater. Said order was issued "to insure that de- [fol. 638] liveries of gas by the four CATCO companies to Tennessee Gas will commence as promptly as possible." The CATCO companies have expended great sums in developing gas reserves underlying their offshore leases, and as indicated above, Tennessee is now constructing facilities for the transmission of this gas which are scheduled for completion by the end of this year. Under these circumstances, it is clear that Tidewater has a direct and immediate interest in any attempt to set aside the June 24, 1957, order and thereby prevent the sale and delivery of gas pursuant to such order. Tidewater's vital interest in this matter cannot be adequately protected unless it is allowed to intervene herein.

Prayer

Wherefore, premises considered, Tidewater moves and prays:

1. That it be authorized and permitted by this Court to intervene in this cause in opposition to Petitioner and in support of the validity and correctness of the action and orders of Respondent.

2. That in accordance with Rule 18(6), it be permitted [fol. 639] to participate in the designation of the record.

3. That it be permitted to file an answer to the Petition for Review within such time and upon such terms as this Court may designate.

4. That pursuant to the Rules of this Court, it be permitted to participate in the briefing, oral argument, and submission of this matter.

5. For such other orders or directions as this Court may deem proper in the premises.

Respectfully submitted,

Tidewater Oil Company, By: /s/ Gene M. Woodfin, Its Attorney.

Gene M. Woodfin, J. Evans Attwell, Niels Esperson Building, Houston 2, Texas.

Robert O. Koch, Tidewater Oil Company, P. O. Box 1404, Houston, Texas, Counsel for Intervenor.

[fol. 640] *Duly sworn to by Gene M. Woodfin, jurat omitted in printing.*

[fol. 641] Certificate of Service (omitted in printing).

[fol. 642] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12403

LONG ISLAND LIGHTING COMPANY, PUBLIC SERVICE ELECTRIC AND GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION, Respondent.

MOTION OF TIDEWATER OIL COMPANY TO INTERVENE IN OPPOSITION TO THE PETITION FOR REVIEW—Filed October 17, 1957

[fol. 643] To the United States Court of Appeals for the Third Circuit and the Honorable Justices Thereof:

Tidewater Oil Company (Tidewater) respectfully moves the Court for permission to intervene herein in opposition to the Petition for Review of Long Island Lighting Company and Public Service Electric and Gas Company (Petitioners), and in support of the correctness and binding effectiveness of the orders of the Federal Power Commission (Commission) sought to be attacked by Petitioners, and as required by Rule 18(6) of this Court, shows as follows:

Nature of Tidewater's Interest and Grounds Upon Which Intervention Is Sought

Tidewater Oil Company is an independent producer engaged in the production and sale of natural gas. Tidewater, Continental Oil Company (Continental), Atlantic Refining Company (Atlantic) and Cities Service Production Company (Cities Service) each owns an undivided Gulf of Mexico off the shore of Cameron and Vermilion twenty-five percent (25%) interest in certain leases in the Parishes, Louisiana. Each of the afore-mentioned indepen-

dent producers applied for a Certificate of Public Convenience [fol. 644] and Necessity pursuant to Section 7(c) of the Natural Gas Act, 15 U.S.C.A. Section 717f(c) for the sale of natural gas from these leases in the Gulf of Mexico to Tennessee Gas Transmission Company. (Tennessee) pursuant to separate contracts between each Seller and Tennessee. Tidewater's application for a Certificate of Public Convenience and Necessity was filed on September 10, 1956, in Docket No. G-11049; Continental's application was filed on September 5, 1956, in Docket No. G-11024; Atlantic's application was filed on September 7, 1956, in Docket No. G-11034; and Cities Service's application was filed on September 10, 1956, in Docket No. G-11046. These applicants are collectively referred to as the CATCO companies. These proceedings were consolidated by order of the Federal Power Commission and were heard on a single record.

Concurrently, by application dated September 19, 1956, Tennessee applied for a Certificate of Public Convenience and Necessity pursuant to 15 U.S.C.A., Section 717f(c) for authority to institute construction of facilities to transport the gas from the offshore locations to the mainland. By order of the Commission issued April 22, 1957, as modified [fol. 645] by an order issued May 20, 1957, Tennessee was granted a temporary Certificate of Public Convenience and Necessity authorizing it to construct and operate such facilities, and pursuant to this certificate it has commenced construction of approximately 107 miles of pipe line from the offshore platforms of the CATCO companies to a point on Tennessee's main transmission line at Kinder, Louisiana.

Pursuant to notice issued February 8, 1957, hearings on the CATCO applications were held February 28, 1957, and concluded the following day. Intervention by various parties including the Petitioners herein was permitted by order of the Commission issued February 27, 1957. Subsequent to the decision of the Presiding Examiner issued March 29, 1957, and intermediate orders of the Commission issued on April 22, 1957, and May 20, 1957, these applications culminated in the Commission's order of June 24, 1957, which issued conditional certificates to each of the CATCO

companies. Each of the CATCO companies has complied with the conditions set forth in Paragraphs (B) and (C) of the order issued by the Commission on June 24, 1957. [fol. 646] Tidewater complied with the conditions by filing with the Commission within twenty (20) days after the issuance of said order an amendment to its contract with Tennessee and a corporate resolution authorizing such amendment. Petitioners' application for a rehearing of the June 24th order was denied by the Commission's order issued April 15, 1957.

The order from which the Petitioners appeal arose from proceedings before the Commission in which the Petitioners were intervenors in opposition to Tidewater's application for a Certificate of Public Convenience and Necessity. Tidewater was a party to said proceedings and presented evidence in support of its application for such certificate. In its Petition for Review the Petitioners, inter alia, pray that the Court:

> "Review the order issued June 24, 1957, by the Respondent, Federal Power Commission, as modified by the order issued August 15, 1957, and enter a judgment vacating and setting said order aside."

If the order issued by the Commission on June 24, 1957, is set aside as requested in that part of Petitioners' prayer set out above, there would be a substantial adverse effect upon Tidewater. Said order was issued "to insure that de- [fol. 647] liveries of gas by the four CATCO companies to Tennessee Gas will commence as promptly as possible." The CATCO companies have expended great sums in developing gas reserves underlying their offshore leases, and as indicated above, Tennessee is now constructing facilities for the transmission of this gas which are scheduled for completion by the end of this year. Under these circumstances, it is clear that Tidewater has a direct and immediate interest in any attempt to set aside the June 24, 1957, order and thereby prevent the sale and delivery of gas pursuant to such order. Tidewater's vital interest in this matter cannot be adequately protected unless it is allowed to intervene herein.

Prayer

Wherefore, premises considered, Tidewater moves and prays:

1. That it be authorized and permitted by this Court to intervene in this cause in opposition to Petitioners and in support of the validity and correctness of the action and orders of Respondent.

2. That in accordance with Rule 18(6), it be permitted [fol. 648] to participate in the designation of the record.

3. That it be permitted to file an answer to the Petition for Review within such time and upon such terms as this Court may designate.

4. That pursuant to the Rules of this Court, it be permitted to participate in the briefing, oral argument, and submission of this matter.

5. For such other orders or directions as this Court may deem proper in the premises.

Respectfully submitted,

Tidewater Oil Company, By: /s/ Gene M. Woodfin, Its Attorney.

Gene M. Woodfin, J. Evans Attwell, Niels Esperson Building, Houston 2, Texas.

Robert O. Koch, Tidewater Oil Company, P. O. Box 1404, Houston, Texas, Counsel for Intervenor.

[fol. 649] *Duly sworn to by Gene M. Woodfin, jurat omitted in printing.*

[fol. 650] Certificate of Service (omitted in printing).

[fol. 651] [File endorsement omitted]

[fol. 652]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12401

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

FEDERAL POWER COMMISSION, Respondent.

MOTION OF CONTINENTAL OIL COMPANY FOR LEAVE TO INTERVENE—Filed October 18, 1957

To the Honorable Judges of the United States Court of Appeals for the Third Circuit:

Comes Now Continental Oil Company (Continental), pursuant to Rule 18(6) of this Court, and files this Motion for Leave to Intervene in the above styled and numbered cause in opposition to the Petition for Review, to be made a party thereto in support of the Order sought to be reviewed, with the right to be heard upon briefs and oral argument and to otherwise participate fully as a party in this proceeding. The grounds for this Motion are as follows:

[fol. 653] 1.

Continental is a corporation duly organized and existing under the laws of the State of Delaware, with its principal office in Houston, Texas (such office being in the Texas National Bank Building, and its mailing address being Box 2197). Continental is engaged in the business of searching for, producing, refining, and selling oil and gas and their products. It is qualified to do business in each of the forty-eight states and in the District of Columbia. Continental is the "Continental Oil Company" referred to in the Petition for Review.

2.

On October 7, 1957, the Public Service Commission of the State of New York (Petitioner) filed a Petition for Review of the Order of the Federal Power Commission issued June 24, 1957, in consolidated Dockets No. G-11024, *In the Matter of Continental Oil Company,* No. G-11034, *In the Matter of The Atlantic Refining Company,* No. G-11046, *In the Matter of Cities Service Production Company,* and No. G-11049, *In the Matter of Tidewater Oil Company.*

3.

Continental is the principal party in Docket No. 11024, *In the Matter of Continental Oil Company,* which is one of the consolidated dockets which resulted in the Order from which Petitioner appeals, which Order authorized Con- [fol. 654] tinental to sell gas to Tennessee Gas Transmission Company from properties offshore the State of Louisiana in the Gulf of Mexico. This Order which is sought to be reviewed intimately concerns Continental, which is the only real respondent in interest insofar as the appeal concerns Docket No. G-11024, and the relief sought by Petitioner will, if granted, have a direct, substantial and adverse effect on Continental.

4.

Continental's interest may not be adequately represented by the Respondent herein. Continental proposes to show that there is no merit in the contentions of Petitioner, that Respondent's Order from which this appeal is taken is proper and in the public interest, and that the prices to be paid under the contract and of which the Petition for Review complains are the subject of rate investigations instituted by the Federal Power Commission in Docket G-9279, under the provisions of Section 5(a) of the Natural Gas Act, which investigations are being currently prosecuted by the Federal Power Commission and will adequately protect the public interest in all matters in regard to any prices to be paid or received in connection with the sale which is the subject matter of these proceedings.

[fol. 655] Wherefore, Continental prays for leave to intervene in opposition to the Petition for Review, to be made a party thereto in support of the Order sought to be reviewed, with the right to be heard upon briefs and oral argument and to otherwise participate fully as a party in this proceeding.

Respectfully submitted,

Continental Oil Company, /s/ Roland B. Voight, Original signed, By: Roland B. Voight, Its Attorney.

Mailing Address: Box 2197, Houston 1, Texas.

October 17, 1957.

[fol. 656] *Duly sworn to by Roland B. Voight, jurat omitted in printing.*

[fol. 657] Certificate of Service (omitted in printing).

[fol. 659] [File endorsement omitted]

[fol. 660]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12403

LONG ISLAND LIGHTING COMPANY AND PUBLIC SERVICE ELECTRIC AND GAS COMPANY, Petitioners,

v.

FEDERAL POWER COMMISSION, Respondent.

MOTION OF CONTINENTAL OIL COMPANY FOR LEAVE TO INTERVENE—October 21, 1957

To the Honorable Judges of the United States Court of Appeals for the Third Circuit:

Comes Now Continental Oil Company (Continental), pursuant to Rule 18(6) of this Court, and files this Motion

for Leave to Intervene in the above styled and numbered cause in opposition to the Petition for Review, to be made a party thereto in support of the Order sought to be reviewed, with the right to be heard upon briefs and oral argument and to otherwise participate fully as a party in this proceeding. The grounds for this Motion are as follows:

[fol. 661]

1.

Continental is a corporation duly organized and existing under the laws of the State of Delaware, with its principal office in Houston, Texas (such office being in the Texas National Bank Building, and its mailing address being Box 2197). Continental is engaged in the business of searching for, producing, refining, and selling oil and gas and their products. It is qualified to do business in each of the forty-eight states and in the District of Columbia. Continental is the "Continental Oil Company" referred to in the Petition for Review.

2.

On October 11, 1957, Long Island Lighting Company and Public Service Electric and Gas Company (Petitioners) filed a Petition for Review of the Order of the Federal Power Commission issued June 24, 1957, in consolidated Dockets No. G-11024, *In the Matter of Continental Oil Company,* No. G-11034, *In the Matter of The Atlantic Refining Company,* No. G-11046, *In the Matter of Cities Service Production Company,* and No. G-11049, *In the Matter of Tidewater Oil Company.*

3.

Continental is the principal party in Docket No. 11024, *In the Matter of Continental Oil Company,* which is one of the consolidated dockets which resulted in the Order from which Petitioner appeals, which Order authorized [fol. 662] Continental to sell gas to Tennessee Gas Transmission Company from properties offshore the State of Louisiana in the Gulf of Mexico. This Order which is sought to be reviewed intimately concerns Continental,

which is the only real respondent in interest insofar as the appeal concerns Docket No. G-11024, and the relief sought by Petitioner will, if granted, have a direct, substantial and adverse effect on Continental.

4.

Continental's interest may not be adequately represented by the Respondent herein. Continental proposes to show that there is no merit in the contentions of Petitioner, that Respondent's Order from which this appeal is taken is proper and in the public interest, and that the prices to be paid under the contract and of which the Petition for Review complains are the subject of rate investigations instituted by the Federal Power Commission in Docket G-9279, under the provisions of Section 5(a) of the Natural Gas Act, which investigations are being currently prosecuted by the Federal Power Commission and will adequately protect the public interest in all matters in regard to any prices to be paid or received in connection with the sale which is the subject matter of these proceedings.

[fol. 663] Wherefore, Continental prays for leave to intervene in opposition to the Petition for Review, to be made a party thereto in support of the Order sought to be reviewed, with the right to be heard upon briefs and oral argument and to otherwise participate fully as a party in this proceeding.

Respectfully submitted,

Continental Oil Company, /s/ Roland B. Voight, Original signed, By: Roland B. Voight, Its Attorney.

Mailing Address: Box 2197, Houston 1, Texas.

October 21, 1957

[fol. 664] *Duly sworn to by Roland B. Voight, jurat omitted in printing.*

[fol. 665] Certificate of Service (omitted in printing).

[fol. 667] [File endorsement omitted]

[fol. 668]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12401

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

FEDERAL POWER COMMISSION, Respondent.

JOINT MOTION OF THE ATLANTIC REFINING COMPANY AND CITIES SERVICE PRODUCTION COMPANY FOR LEAVE TO INTERVENE—Filed October 18, 1957

To the United States Court of Appeals for the Third Circuit and the Honorable Judges Thereof:

The Atlantic Refining Company (Atlantic) and Cities Service Production Company (Cities Service) move this Honorable Court for leave to intervene in the above-entitled cause in opposition to the Petition for Review of an Order of the Federal Power Commission, dated June 24, 1957, filed by the Public Service Commission of the State of New York (Petitioner), said order having been issued by the Commission in proceedings before it, designated *In the Matters of Continental Oil Company,* Docket No. [fol. 669] G-11024; *The Atlantic Refining Company,* Docket No. G-11034; *Cities Service Production Company,* Docket No. G-11046; and *Tidewater Oil Company,* Docket No. G-11049. In support of this motion, Atlantic and Cities Service respectfully show as follows:

I

The Atlantic Refining Company is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, having its principal office in Philadelphia, Pennsylvania, and its principal place of business with re-

spect to natural gas in Dallas, Texas. Cities Service Production Company is a corporation organized and existing under the laws of the State of Delaware, and having its principal place of business in Bartlesville, Oklahoma.

II

Atlantic and Cities Service were parties to the proceedings before the Federal Power Commission which resulted in the aforesaid order of the Federal Power Commission issued June 24, 1957, of which review is here sought by Petitioner. In September 1956, Atlantic and Cities Service, together with Continental Oil Company and Tidewater Oil Company, herein collectively referred to as CATCO companies, filed applications for certificates of public convenience and necessity pursuant to Section 7 of the Natural Gas Act,[1] requesting authority to sell gas [fol. 670] produced by them from certain leases situated off the coast of Louisiana to Tennessee Gas Transmission Company (Tennessee). Each of the four CATCO companies owns a one-fourth interest in gas leases located in the Gulf of Mexico off the coast of Louisiana in the East Cameron, West Cameron, and Vermilion areas. The leases total approximately 95,000 acres and contain reserves of approximately 1,673,929,000 Mcf. Atlantic and Cities Service, together with the other CATCO companies, own facilities such as platforms, wells, separators, and meters, for the purpose of production and delivery of gas from these leases.

Pursuant to contracts executed on August 10 and 14, 1956, respectively, the basic provisions of which are identical, Atlantic and Cities Service, each has agreed and is obligated to sell to Tennessee, at the off-shore platforms, 25% of 175,000 Mcf of natural gas per day, or 4/5ths of the total quantity which the wells are capable of producing, whichever is the lesser, until November 1, 1958. After that date, the contracts provide for the delivery of 1,000 Mcf per day for every 8,000,000 Mcf of recoverable gas originally in place in the dedicated reserves.

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[1] Act of June 21, 1938, Section 7, 52 Stat. 821, 824, as amended 56 Stat. 83, 15 U.S.C. 717f.

The initial price, pursuant to the contracts, is 21.4¢ per Mcf[2] until November 1, 1962. Thereafter, the contracts, as amended in accordance with the Commission's aforesaid [fol. 671] order of June 24, 1957, provide for increases in the rate to be charged to Tennessee up to 2¢ per Mcf for every 4-year period throughout the term of the contract.

Petitioner, by its Petition for Review, seeks to set aside the order by which the Federal Power Commission issued certificates of public convenience and necessity authorizing Atlantic and Cities Service to sell gas to Tennessee. In addition to setting aside authority to sell gas to Tennessee, the requested action would also result in abrogation of valuable contract rights of Atlantic and Cities Service resulting in irreparable injury to them. Loss of such contract rights would in turn threaten still further injury through jeopardizing the underlying leases of Atlantic and Cities Service.

III

It is, therefore, respectfully submitted that Atlantic and Cities Service have obvious direct and substantial interests in opposing the Petition for Review of the Public Service Commission of the State of New York in this proceeding.

IV

Atlantic and Cities Service seek to intervene in the above-entitled cause in support of the aforesaid order of the Federal Power Commission, dated June 24, 1957, to show that said order is lawful and proper in the public interest. [fol. 672]

V

Attorneys for Petitioner and Respondent have authorized Atlantic and Cities Service to state herein that they will not oppose the granting of intervention as here requested.

---

[2] As applicable, a reimbursement for the Louisiana Gathering Tax of 1¢ per Mcf or its Federal equivalent would be added to this amount.

Wherefore, by reason of the foregoing, Atlantic and Cities Service move that they be granted leave to intervene as parties to this proceeding, and that they be permitted to file briefs, to participate in the designation of the record, to make oral argument, and have all other rights due to be accorded to them as parties.

Respectfully submitted,

The Atlantic Refining Company and Cities Service Production Company, By /s/ Bernard A. Foster, Jr., Ross, Marsh & Foster, Their Attorney.

October 17, 1957

[fol. 673] *Duly sworn to by Bernard A. Foster, Jr., jurat omitted in printing.*

[fol. 674] Certificate of Service (omitted in printing).

[fol. 675] [File endorsement omitted]

[fol. 676]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12403

LONG ISLAND LIGHTING COMPANY, PUBLIC SERVICE ELECTRIC AND GAS COMPANY, Petitioners,

v.

FEDERAL POWER COMMISSION, Respondent.

JOINT MOTION OF THE ATLANTIC REFINING COMPANY AND CITIES SERVICE PRODUCTION COMPANY FOR LEAVE TO INTERVENE—Filed October 18, 1957

To the United States Court of Appeals for the Third Circuit and the Honorable Judges Thereof:

The Atlantic Refining Company (Atlantic) and Cities Service Production Company (Cities Service) move this

Honorable Court for leave to intervene in the above-entitled cause in opposition to the "Joint and Several Petition for Review of Decision and Order of the Federal Power Commission, dated June 24, 1957," filed by the Long Island Lighting Company and Public Service Electric and Gas Company (Petitioners), said order having been issued by the Commission in proceedings before it, designated *In the Matters of Continental Oil Company,* Docket No. G-11024; *The Atlantic Refining Company,* Docket No. G-[fol. 677] 11034; *Cities Service Production Company,* Docket No. G-11046; and *Tidewater Oil Company,* Docket No. G-11049. In support of this motion, Atlantic and Cities Service respectfully show as follows:

I

The Atlantic Refining Company is a corporation organized and existing under the laws of the Commonwealth of Pennsylvania, having its principal office in Philadelphia, Pennsylvania, and its principal place of business with respect to natural gas in Dallas, Texas. Cities Service Production Company is a corporation organized and existing under the laws of the State of Delaware, and having its principal place of business in Bartlesville, Oklahoma.

II

Atlantic and Cities Service were parties to the proceedings before the Federal Power Commission which resulted in the aforesaid order of the Federal Power Commission issued June 24, 1957, of which review is here sought by Petitioners. In September 1956, Atlantic and Cities Service, together with Continental Oil Company and Tidewater Oil Company, herein collectively referred to as CATCO companies, filed applications for certificates of public convenience and necessity, pursuant to Section 7 [fol. 678] of the Natural Gas Act,[1] requesting authority to sell gas produced by them from certain leases situated off the coast of Louisiana to Tennessee Gas Transmission

[1] Act of June 21, 1938, Section 7, 52 Stat. 821, 824, as amended, 56 Stat. 83, 15 USC 717f.

Company (Tennessee). Each of the four CATCO companies owns a one-fourth interest in gas leases located in the Gulf of Mexico off the coast of Louisiana in the East Cameron, West Cameron, and Vermilion areas. The leases total approximately 95,000 acres and contain reserves of approximately 1,673,929,000 Mcf. Atlantic and Cities Service, together with the other CATCO companies, own facilities such as platforms, wells, separators, and meters, for the purpose of production and delivery of gas from these leases.

Pursuant to contracts executed on August 10 and 14, 1956, respectively, the basic provisions of which are identical, Atlantic and Cities Service, each has agreed and is obligated to sell to Tennessee, at the off-shore platforms, 25% of 175,000 Mcf of natural gas per day, or 4/5ths of the total quantity which the wells are capable of producing, whichever is the lesser, until November 1, 1958. After that date, the contracts provide for the delivery of 1,000 Mcf per day for every 8,000,000 Mcf of recoverable gas originally in place in the dedicated reserves.

The initial price, pursuant to the contracts, is 21.4¢ per Mcf[2] until November 1, 1962. Thereafter, the contracts, as amended in accordance with the Commission's [fol. 679] aforesaid order of June 24, 1957, provide for increases in the rate to be charged to Tennessee up to 2¢ per Mcf for every 4-year period throughout the term of the contract.

Petitioners, by their Joint and Several Petition for Review, seek to set aside the order by which the Federal Power Commission issued certificates of public convenience and necessity authorizing Atlantic and Cities Service to sell gas to Tennessee. In addition to setting aside authority to sell gas to Tennessee, the requested action would also result in abrogation of valuable contract rights of Atlantic and Cities Service resulting in irreparable injury to them. Loss of such contract rights would in turn threaten still further injury through jeopardizing the underlying leases of Atlantic and Cities Service.

---

[2] As applicable, a reimbursement for the Louisiana Gathering Tax of 1¢ per Mcf or its Federal equivalent would be added to this amount.

III

It is, therefore, respectfully submitted that Atlantic and Cities Service have obvious direct and substantial interests in opposing the Joint and Several Petition for Review of Long Island Lighting Company and Public Service Electric and Gas Company in this proceeding.

IV

Atlantic and Cities Service seek to intervene in the above-entitled cause in support of the aforesaid order of the Federal Power Commission, dated June 24, 1957, to show that said order is lawful and proper in the public interest. [fol. 680]

V

Attorneys for Petitioners and Respondent have authorized Atlantic and Cities Service to state herein that they will not oppose the granting of intervention as here requested.

Wherefore, by reason of the foregoing, Atlantic and Cities Service move that they be granted leave to intervene as parties to this proceeding, and that they be permitted to file briefs, to participate in the designation of the record, to make oral argument, and have such other rights due to be accorded to them as parties.

Respectfully submitted,

The Atlantic Refining Company and Cities Service Production Company, By /s/ Bernard A. Foster, Jr., Ross, Marsh & Foster, Their Attorney.

October 17, 1957

[fol. 681] *Duly sworn to by Bernard A. Foster, Jr., jurat omitted in printing.*

[fol. 682] Certificate of Service (omitted in printing).

[fol. 683] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,401

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

vs.

FEDERAL POWER COMMISSION, Respondent.

Present: Goodrich, Staley and Hastie, Circuit Judges

ORDER GRANTING MOTION FOR LEAVE TO INTERVENE, ETC.—
October 22, 1957

Upon consideration of the motions by Tennessee Gas Transmission Company, Tidewater Oil Company, Continental Oil Company, and the joint motion by Atlantic Refining Company and Cities Service Production Company for leave to intervene in the above-entitled case; and there being no opposition to the motions;

It is Ordered that

1. Tennessee Gas Transmission Company,
2. Tidewater Oil Company,
3. Continental Oil Company,
4. Atlantic Refining Company and Cities Service Production Company

be, and they are hereby granted leave to intervene, to participate in the designation of record, to file briefs, and to participate in the oral argument.

By the Court, Herbert F. Goodrich, Circuit Judge.

October 22, 1957

[fol. 684] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,403

LONG ISLAND LIGHTING COMPANY, PUBLIC SERVICE ELECTRIC AND GAS COMPANY, Petitioners,

v.

FEDERAL POWER COMMISSION, Respondent.

Present: Goodrich, Staley and Hastie, Circuit Judges.

ORDER GRANTING MOTION FOR LEAVE TO INTERVENE, ETC.—
October 22, 1957

Upon consideration of the motions by Tidewater Oil Company, Tennessee Gas Transmission Company, Continental Oil Company, and the joint motion by Atlantic Refining Company and Cities Service Production Company for leave to intervene in the above-entitled case; and there being no opposition to the motions;

It is Ordered that

1. Tidewater Oil Company,
2. Tennessee Gas Transmission Company,
3. Continental Oil Company,
4. Atlantic Refining Company and Cities Service Production Company

be, and they are hereby granted leave to intervene, to participate in the designation of record, to file briefs, and to participate in the oral argument.

By the Court, Goodrich, Circuit Judge.

October 22, 1957

[fol. 685] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,401
No. 12,403

PUBLIC SERVICE COMMISSION OF STATE OF NEW YORK,
Petitioner,

v.

FEDERAL POWER COMMISSION, Respondent.

LONG ISLAND LIGHTING COMPANY AND PUBLIC SERVICE ELECTRIC AND GAS COMPANY, Petitioner,

v.

FEDERAL POWER COMMISSION, Respondent.

JOINT MOTION TO FIX DATES FOR FILING BRIEFS BEFORE CONSOLIDATED JOINT APPENDIX IS PRINTED; TO PROVIDE THE MODE OF CITATION TO THE RECORD IN THE BRIEFS; AND TO PROVIDE FOR THE PRINTING OF THE JOINT APPENDIX FOLLOWING THE DATES FIXED FOR FILING BRIEFS—Filed December 9, 1957

All parties to the above proceedings, involving two petitions to review a single order of the Federal Power Commission, move that this Court enter an order as follows:

I,

A. Fixing dates for filing briefs to be followed by a printed joint appendix, as follows:

(1) Petitioners' briefs to be served and filed not later than January 20, 1958.

(2) Respondent's brief to be served and filed not later than February 28, 1958.

(3) Petitioners' reply briefs to be served and filed not leter (sic) than March 17, 1958.

(4) Any intervenor permitted to intervene by the Court who objects to the order sought to be reviewed shall file at the same time as petitioner, and any intervenor who supports the order sought to be reviewed shall file at the same time as respondent.

[fol. 686] (5) Counsel for all parties to agree informally not later than March 1, 1958, upon portions of the single record to be printed as provided for in Rule 18(7) of this Court's rules.

(6) Petitioners to print or reproduce, in conformity with rules of this Court, a joint appendix containing portions of record agreed to be printed and filed not later than March 17, 1958.

B. Providing that in the briefs citations be made to the record as it has been certified to this Court (e.g., "R. 000"), instead of to the pages of the printed joint appendix and providing for printing or reproducing, otherwise, in accordance with the Rules, of the joint appendix as follows:

(1) The page numbers of the record as certified to this Court to be printed in bold-face type, interrupting the text type at the precise points where each new certified record page begins.

(2) Running heads to be printed in bold-face type at the outer top corner of each page of the joint appendix to indicate the first and last record pages, any part of which appears on the respective left and right page of each facing pair of joint appendix pages.

(3) The usual numerical pagination of the joint appendix to be printed in modern (i.e., light-face) type in the center of each printed record page, either at the bottom or the top.

II.

In support of this motion, the parties join in showing as follows:

A. Respondent has filed with the Clerk of this Court certified lists of all documents, transcripts of testimony,

exhibits and other material comprising the record in these proceedings adequately describing each and indicating its page numbers and has provided a pagination for all such material. The record certification in Nos. 12,401 and 12,403 are identical in all respects.

[fol. 687] B. Counsel for the parties hereto agree that they will designate for printing only such portions of the certified record as are cited in the briefs and are necessary for the Court to read in order to resolve controverted issues. They jointly and severally undertake to keep the size of the joint appendix to the minimum. In reaching agreement upon the portions of the record to be printed, counsel for petitioners shall designate from the citations in their briefs first; counsel for any intervenors objecting to the order under review shall then designate any additions from the citations in their briefs; counsel for respondent shall next designate any addition from its citations; and, lastly, any intervenors supporting the order under review shall designate any additions from their citations. Petitioners will pay for the printing of the portions of the record so designated and shall be entitled to reimbursement from other parties except the respondent, Federal Power Commission, for the costs of printing any additional designations made by counsel for such other parties, respectively. In the event of any disagreement over the reimbursement, the Court may, upon motion, resolve the controversy in accordance with the terms hereof, the applicable Rules of Court not in conflict herewith, and principles of law and equity.

C. Counsel for the parties believe and represent to the Court that the procedures herein sought will expedite the early disposition of this proceeding, will save the Court and all counsel substantial time, and will save printing and other expense.

D. Counsel for all parties seek to follow the practice of printing the joint appendix after all briefs have been filed, and thereby achieve the savings in time of counsel and in printing and other expenses made possible by that procedure, which counsel for the Federal Power Commission

represent, and counsel for the other parties hereto are informed and believe, are substantial. This procedure has [fol. 688] heretofore been followed with very satisfactory results in a large number of proceedings to which the Federal Power Commission has been a party, in this and other circuits. See e.g., Joint Motion of Parties To Fix Dates for Filing Briefs, etc., in *Phillips Petroleum Co.* v. *F.P.C.*, No. 5695, CA 3.

E. Counsel for each party hereby stipulate that if the procedure herein sought with respect to filing briefs and printing portions of the record is allowed, they will serve on counsel for each of the other parties six copies of their briefs and petitioners will furnish six copies of the record so printed to respondent and intervenors.

For the convenience of the Court there is submitted herewith a proposed form of order.

Respectfully submitted,

Kent H. Brown, Counsel for Petitioner, Public Service Commission of State of New York.

Edward S. Kirby, Counsel for Petitioner, Public Service Electric and Gas Company.

Howard E. Wahrenbroch, Counsel for Respondent, Federal Power Commission.

Gene M. Woodfin, Counsel for Intervenor, Tidewater Oil Company.

David K. Kadene, Edward M. Barret, Counsel for Petitioner, Long Island Lighting Co.

Harry S. Littman, Counsel for Intervenor, Tennessee Gas Transmission Company.

Roland B. Voight, Counsel for Intervenor, Continental Oil Company.

Bernard A. Foster, Jr., Counsel for Intervenor, Cities Service Production Company.

Bernard A. Foster, Jr., Counsel for Intervenor, Atlantic Refining Company.

[fol. 689] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,401
No. 12,403

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

FEDERAL POWER COMMISSION, Respondent.

LONG ISLAND LIGHTING COMPANY AND PUBLIC SERVICE ELECTRIC AND GAS COMPANY, Petitioner.

v.

FEDERAL POWER COMMISSION, Respondent.

FIXING DATES FOR FILING BRIEFS BEFORE CONSOLIDATED JOINT APPENDIX IS PRINTED, PRESCRIBING THE MODE OF CITATION TO THE RECORD IN THE BRIEFS, AND PROVIDING FOR PRINTING THE JOINT APPENDIX AFTER THE DATES FIXED FOR FILING BRIEFS.
—December 12, 1957

Upon consideration of the joint motion of all parties herein to fix dates for filing briefs before the record is printed, to prescribe the mode of citation to the record in the briefs, and to provide for printing or reproducing otherwise the joint appendix after the dates fixed for filing briefs, it is

Ordered by the Court as follows:

A. The dates for filing briefs and designating the parts of the record to be printed are set as follows:

(1) Petitioners' opening briefs shall be served and filed not later than January 20, 1958.

(2) Respondent's brief shall be served and filed not later than February 28, 1958.

(3) Petitioners' reply briefs shall be served and filed not later than March 17, 1958.

[fol. 690] (4) Any intervener who objects to the order sought to be reviewed shall file at the same time as petitioners and any intervener who supports the order shall file at the same time as respondent.

(5) Counsel for all parties shall agree informally not later than March 1, 1958, upon the portions of the record to be printed. In reaching agreement upon the portions of the record to be printed, counsel for petitioners shall designate from the citations in their briefs first; counsel for any interveners objecting to the order under review shall then designate any additions from the citations in their briefs; counsel for respondent shall next designate any addition from its citations; and, lastly, any interveners supporting the order under review shall designate any additions from their citations. Petitioners will pay for the printing of the portions of the record so designated and shall be entitled to reimbursement from other parties except the respondent, Federal Power Commission, for the costs of printing any additional designations made by counsel for such other parties, respectively. In the event of any disagreement over reimbursement, the Court, upon motion, may resolve the controversy in accordance with the terms hereof, the applicable Rules of Court not in conflict herewith, and principles of law and equity.

(6) Petitioners will print or reproduce in conformity with the rules of this Court a joint appendix containing the designated portions of the record, which will be filed not later than March 17, 1958.

[fol. 691] B. In the briefs citations shall be made to the record as certified to this Court (e.g., "R. 000") instead of to pages of the joint appendix. The portions of the record agreed upon shall be printed in accordance with the Rules, as follows:

(1) Page numbers of the record as certified to the Court shall be printed in bold-face type, interrupting the

text at the precise points where each new certified record page begins;

(2) Running heads shall be printed in bold-face type at the outer top corner of each page of the joint appendix to indicate the first and last record pages, any part of which appears on the respective left and right pages of each facing pair of printed record pages;

(3) The usual numerical pagination of the printed record shall be printed in modern (i.e., light-face) type in the center of each joint appendix page, either at the bottom or the top.

Per Curiam
William H. Hastie, Circuit Judge.

Dated: Dec. 12, 1957.

[fol. 692] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,403

LONG ISLAND LIGHTING COMPANY, PUBLIC SERVICE ELECTRIC AND GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION, Respondent.

ORDER—February 24, 1958

It is Ordered that the parties in the above-entitled case be, and they are hereby granted leave to omit from the joint appendix any orders which are included in the printed petition to review.

Maris, Circuit Judge.

February 24, 1958.

[fol. 693]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,401

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

v.

FEDERAL POWER COMMISSION, Respondent.

No. 12,403

LONG ISLAND LIGHTING COMPANY, PUBLIC SERVICE ELECTRIC AND GAS COMPANY, Petitioners,

v.

FEDERAL POWER COMMISSION, Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION

Argued March 21, 1958

Before Kalodner, Staley and Hastie, Circuit Judges.

OPINION OF THE COURT—Filed June 30, 1958

By STALEY, Circuit Judge.

Serious questions involving the authority of the Federal Power Commission are presented in these petitions to review an order of the Commission granting certificates of [fol. 694] public convenience and necessity pursuant to Section 7(e) of the Natural Gas Act, 15 U.S.C. § 717f(e).

Oil leases in the Gulf of Mexico off the shore of Cameron and Vermilion parishes in Louisiana are owned by four

independent producers of natural gas, Cities Service Production Company, The Atlantic Refining Company, Tidewater Oil Company, and Continental Oil Company. They are referred to collectively as the CATCO companies. In the early part of September, 1956, CATCO applied to the Federal Power Commission for certificates of public convenience and necessity for authority to sell their natural gas to Tennessee Gas Transmission Company, pursuant to contracts executed in August, 1956. Later in September, 1956, Tennessee Gas itself applied for a certificate of public convenience and necessity for authority to expand its facilities in preparation for the purchase of the gas from CATCO.

The contracts between the CATCO producers and Tennessee Gas provided for an initial rate of 22.4 cents per Mcf (including one cent gathering tax reimbursement), with an automatic increase of two cents every four years thereafter. The highest rate Tennessee Gas had previously paid for natural gas in the area was 18 cents per Mcf. The offshore gas fields in question represent the largest reserve ever committed to one sale, and the sale proposed is the first from the newly developed fields which will provide impressive proportions of future gas supply.

Hearings were begun on the CATCO applications on February 28, 1957. Petitioner Public Service Commission of the State of New York, which exercises general regulatory supervision over the gas industry in that state, intervened in the proceedings. An order of the respondent Commission permitted intervention also of four distributing company customers of Tennessee Gas, namely, Long Island Lighting Company, Public Service Electric and Gas Company, Brooklyn Union Gas Company, and Lake Shore Pipe Line Company. Tennessee Gas was the only intervenor in favor of the CATCO applications.

[fol. 695] In the latter part of March, 1957, the presiding examiner's decision ordered the issuance of certificates of public convenience and necessity to the CATCO applicants without conditions as to price, and conditioned only upon the issuance of a certificate to Tennessee Gas for the construction of its necessary facilities.

After exceptions were filed by intervenors, the respondent Commission issued its order of April 22, 1957. It directed the issuance of temporary certificates to the CATCO applicants, but remanded the proceedings to the examiner to determine what initial rates would accord with public convenience and necessity. After reviewing the circumstances which rendered this sale one of extreme importance both as to initial rate and as to the enormous volume of gas proposed to be sold, the Commission found:

> "Those factors make it abundantly evident that, in the public interest, this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest."

The CATCO applicants moved to modify that order, alleging that the economic risk involved would foreclose their acceptance of temporary certificates issued by the respondent Commission. Further, the applicants proposed to change their contracts so as to give the Commission continuing supervision of the proposed sale and future price increases regardless of any change Congress might make in the Natural Gas Act. The initial rate in the contract would stay at 22.4 cents per Mcf, however. No further evidence as to the reasonableness of the initial rate was presented.

The second order, issued May 20, 1957, demonstrated the Commission's desire to extend itself in an effort to be fair to the applicants while protecting the ultimate consumers from rates which might later be determined excessive. This order, however, still recognized that there [fol. 696] was insufficient evidence in the record on which to base a finding that public convenience and necessity required sale of the gas at the initial rate proposed. The plan embodied in the Commission's order was intended to permit the sale of the gas as soon as possible and was to be effectuated in the following manner. Without remanding the proceedings to the examiner, permanent certificates would be issued conditioned upon the initial rate of 18 cents (including the one cent gathering tax reimbursement). The CATCO companies would be entitled to file

for a rate increase to 22.4 cents per Mcf to be effective one day after the commencement of gas deliveries to Tennessee Gas.[1]

The Commission reasoned that the consumers would thereby not be relegated to the cumbersome and time-consuming procedure of a Section 5 proceeding where the burden would be on the Commission to show the rates unreasonable and where there are no provisions for refund in the event the Commission is able to meet its burden. The order, though unusual, was deemed necessary by the Commission to protect all parties concerned.

Still the CATCO applicants were not satisfied, and their dissatisfaction this time was expressed by Tennessee Gas in an application for rehearing filed June 4, 1957, which in part states:

> "Tennessee has been definitely advised by the producer-applicants that they will not amend Section 10 of the contract so as to change the initial rate from 21.4 cents per Mcf to 17 cents per Mcf. [The rates exclude the tax.] Tennessee has been further informed by the producer-applicants that the certificates issued [fol. 697] by said order will not be accepted by them for that reason, and that, accordingly, the contracts will be terminated. * * *"

A rehearing was held on June 12, 1957. No further evidence was added to the record. Counsel for the CATCO companies made it clear that unless CATCO received certificates not conditioned with initial rates they might deem objectionable, they would seek to dispose of their gas elsewhere than in the interstate market.

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[1] Under Section 4 of the Natural Gas Act, the Commission is empowered to suspend rate increases up to a period of five months, but it waived this power by its promise to the applicants to limit suspension to a 24-hour period. The net result would have been to permit the sale almost immediately at the initial rate proposed in the contracts, allow the CATCO applicants the opportunity of proving by Section 4 proceedings that the rate was just and reasonable, and protect the consumers of Tennessee Gas from overpayment by means of the refund provisions of Section 4 in the event CATCO could not meet its burden.

Impressed with this threat, the Commission issued its order of June 24, 1957, in which it granted permanent certificates of public convenience and necessity to the CATCO applicants without any condition affecting the initial price of 22.4 cents per Mcf as originally provided in the contracts with Tennessee Gas. Commissioner Connole dissented. It is this order which petitioners ask us to review.[2]

Tennessee Gas, CATCO, and the Commission argue that the petitioners have no standing to ask this court to review the order of June 24, 1957, because they are not "aggrieved" as required by Section 19(b) of the Act. Essentially, the petitioners represent the ultimate consumers of the gas. In Natural Gas Pipeline Company of America v. Federal Power Commission, 253 F.2d 3 (C.A.3, 1958), cert. pending, we held that a gas transmission company which has passed its increases on to its customers is "aggrieved," since as a matter of ethics and good business, it is required to protect its customers. Here the petitioners are more nearly representative of the ultimate consumers than was Natural Gas Pipeline Company in that case. Furthermore, when it is considered that New York distributors are sup- [fol. 698] plied by Tennessee Gas, that the contract price approved by the Commission's order is 4.4 cents higher than any other price paid by Tennessee Gas, that this is the first sale from new fields which will supply enormous quantities of gas in the future, and that the Commission's order in effect places the burden on the petitioners to show that the rates are unreasonable, it is clear the argument that petitioners are not "aggrieved" is without substance.

The suggestion that petitioners have not exhausted their administrative remedies is equally lacking in merit. The final order of the Commission granted unconditional certificates of public convenience and necessity. Rehearing

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[2] The petitioners pursuing their remedies in this court are Public Service Commission of the State of New York (No. 12,401), and Long Island Lighting Company and Public Service Electric and Gas Company (No. 12,403). Though these are separate petitions for review, we are disposing of both in one opinion. An order of this court issued October 22, 1957, permitted the CATCO companies and Tennessee Gas to intervene in support of the Commission's order under review.

has been denied. Judicial review is the next step, and the suggestion of unsatisfactory administrative remedies which are no remedies at all cannot displace this review.[3]

The petitioners pose substantially similar questions on the merits of the case, namely, whether the Commission committed error in its order of June 24 in dispensing with the consideration of the element of price because of the threat of the producers to withhold the gas from interstate commerce, after two previous determinations by the Commission that the sale should not be certified without evidence in the record that the initial rate was just and reasonable. We conceive of the question, however, as a more fundamental one, involving the statutory jurisdiction of the Federal Power Commission. It is whether the Commission has authority to consider an application for a certificate under Section 7(e) where the terms of the application limit the scope of the inquiry which the Commission is required to make for a determination of public convenience and necessity.

The Commission is empowered by Section 7(e) of the Natural Gas Act to attach reasonable conditions to its [fol. 699] issuance of certificates of public convenience and necessity.[4] One of the conditions the Commission often attaches is the stipulation of the initial rate. The legislative history of Section 7(e) indicates clearly that Congress intended to give the Commission full scope in scrutinizing the rate structure proposed in passing on the issuance of the certificate. Signal Oil and Gas Co. v. Federal Power Commission, 238 F.2d 771, 774, note 3 (C A.3, 1956), cert. denied, 353 U.S. 923 (1957). In the Signal Oil case, this court reaffirmed the statutory authority of the Commission to impose rate conditions where the public convenience and necessity required it. When the Signal Oil case was before the Commission, it said that

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[3] Proceedings under Section 5 of the Act foreclose any possibility of refund to the petitioners of amounts which later may be determined to be excessive.

[4] "• • • The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

the justness and reasonableness of the rate was a "vital element" in demonstrating "that the service proposed is or will be required by the present or future public convenience and necessity." Cities Service Gas Co., et al., 12 P.U.R. 3d 3, 14 (1955). According great weight to the initial rates proposed has been the policy of the Commission over the years as is indicated in its annual reports to Congress.[5]

While the Commission probably should always consider the impact of the proposed initial rate in its determination of public convenience and necessity, we do not reach the question of whether the Commission must fix the initial rate when its inquiry demonstrates that there is a substantial question of the reasonableness of that initial rate. See Oklahoma Natural Gas Co. v. Federal Power Commission, and the dissenting opinion of Judge Bazelon, — F.2d —, (C.A.D.C., decided May 22, 1958).

In the cases before us, the Commission has left no doubt of the importance and necessity of a consideration of the reasonableness of the proposed initial rate. In its first order issued April 22, 1957, the Commission said:

> [fol. 700] "The record contains insufficient evidence or testimony, however, on which to base a finding that the public convenience and necessity requires the sale of these volumes of gas at the particular rate level here proposed. The importance of this issue in certificating this sale cannot easily be overemphasized. This is the largest reserve ever committed to one sale. This is the first sale from the newly developed offshore fields from which large proportions of future gas supplies will be taken. This is the highest price level at which the sale of gas to Tennessee Gas has been proposed.
>
> "Those factors make it abundantly evident that, in the public interest, this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest."

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[5] See dissent of Judge Bazelon in Oklahoma Natural Gas Co. v. Federal Power Commission, —— F.2d ——, (C.A.D.C., May 22, 1958).

Again, in its order of May 20, 1957, the Commission said:

> "* * * As we have already stated, the record does not contain sufficient evidence on which to base a finding that the public convenience and necessity requires the sale of the gas at that particular rate level. * * *"

It was only after the threat of withholding the gas from the interstate market that the Commission retreated from its previous position and granted the certificates without rate conditions by its order of June 24, 1957.[6] Commissioner Connole, in his dissent from this order, puts the problem into sharp focus:

> "The record is plain that the controlling reason the parties refuse to submit their contracts to regulatory review in the manner found to be necessary in the pub- [fol. 701] lic interest is their preference for a proceeding in which the burden would be on the Commission to establish that the rate was more than reasonable. They flatly refuse to submit to one in which the parties would be required to show only that the rate was required by the public convenience and necessity. No citation of authority or reference to regulatory theory is needed to demonstrate that the burden of showing the public convenience and necessity requires a proposed service at a particular price level is on the party seeking to take advantage of the proposed service and not on the tribunal before which the case is to be made. Under the unique conditions found here, the critical importance of that decision is indisputable."

The Commission defends its action by claiming the right to change its mind just as a court might do on rehear-

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[6] It is abundantly clear that the Commission changed its mind about the necessity of establishing that the proposed rate was in the public interest only because of the threat of the producers to withhold the gas from the interstate market unless they got certificates upon their own terms. The producers expressed themselves unequivocally through the application of Tennessee Gas for rehearing directed to the order of May 20, 1957, and further in oral argument at that rehearing.

ing, citing Cia Mexicana de Gas v. Federal Power Commission, 167 F.2d 804 (C.A.5, 1948). The petitioners, however, do not argue to the contrary. Their position is that, since in its first two orders the Commission determined that the record lacked sufficient evidence upon which to base a finding that the sale at the proposed rate would be in the public interest, and as the final order was based upon the same record, there is still insufficient evidence to support such a necessary finding.

The jurisdiction of the Federal Power Commission is entirely statutory. It acts as an arm of Congress, and only as Congress has directed it. It is empowered to grant certificates of public convenience and necessity by Section 7(e) of the Natural Gas Act.

> "Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition [fol. 702] covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. * * * "

The Act entrusts to the Commission, and to the Commission alone, the power and authority to determine the issue of public convenience and necessity. Within the framework of the Natural Gas Act, the Commission alone is entrusted with determining the scope of its inquiry necessary to arrive at the decision of whether to certificate a specific sale. It will be remembered that in its reports to Congress, the Commission has recognized that the element of price is important in determining whether a sale such as this should be approved, and as has been stated above,

both the statute and the courts have recognized the authority of the Commission not only to take price into consideration but to condition a certificate for the sale of gas at a particular rate. In the present case, that the initial rate was a necessary consideration in the scope of inquiry into the determination of public convenience and necessity has been twice recognized by the Commission, even to the extent that its order of May 20, 1957, in fact conditioned the permanent certificates upon a contract amendment as to the initial price.

The Commission has jurisdiction to issue certificates under Section 7(e) based upon its independent judgment after an untrammelled consideration of all the elements which it deems necessary to arrive at that judgment. Congress has not given the Commission power to inquire into the issue of public convenience and necessity where, as [fol. 703] here, the applicant circumscribes the scope of that inquiry by attaching a condition to its application requiring the Commission to forego the consideration of an element which may be necessary in the formulation of its judgment. Otherwise stated, the Commission has not been endowed by Congress with jurisdiction to conduct a *limited* inquiry.

Congress has also made it clear that the applicant must be *willing* to perform the services proposed and conform to the provisions of the Act. The action of the applicants in curtailing the decision-making power of the Commission demonstrates their unwillingness to conform to the provisions of the Act; this in itself would require the denial of the applications. The Commission's function is to regulate the sale of gas by producers willing to sell under regulations arrived at in accordance with the provisions of the Act. Such regulations may not be the result of bargaining with an unwilling seller.

The order of the Federal Power Commission of June 24, 1957, will be vacated, and the proceedings will be remanded to the Commission with directions to proceed in conformity with this opinion.

[fol.705] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,401

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

vs.

FEDERAL POWER COMMISSION, Respondent.

No. 12,403

LONG ISLAND LIGHTING COMPANY, PUBLIC SERVICE ELECTRIC AND GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION, Respondent.

On Petition for Review of an Order of the Federal Power Commission

JUDGMENT—June 30, 1958

This cause came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of June 24, 1957 of the Federal Power Commission be, and it is hereby vacated, and the proceedings remanded to the Commission with directions to proceed in conformity with the opinion of this Court.

[fol. 706] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 12,401

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, Petitioner,

vs.

FEDERAL POWER COMMISSION, Respondent.

No. 12,403

LONG ISLAND LIGHTING COMPANY, PUBLIC SERVICE ELECTRIC AND GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION, Respondent.

Present: Kalodner, Staley and Hastie, Circuit Judges.

ORDER GRANTING MOTION OF INTERVENORS FOR ENLARGEMENT OF TIME FOR FILING PETITION FOR REHEARING—July 8, 1958

Upon consideration of the motion by the intervenors in the above-entitled cases, and there being no opposition to the motion;

It is Ordered that the time for filing a petition for rehearing be, and it is hereby extended to August 15, 1958.

By the Court,

/s/ Staley, Circuit Judge.

July 8, 1958

[fol. 707]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT,

ATTN HARRIET G HUMPHRYS = 2046 U S COURT HOUSE PHILA =

TENNESSEE GAS TRANSMISSION COMPANY IS AN INTERVENER IN 12401 and 12403, IN BEHALF OF RESPONDENT. WE RECEIVED COPY OF ORDER THIS MORNING EXTENDING TIME FOR FILING A PETITION FOR REHEARING TO AUGUST 15, 1958 WE ASSUME THE EXTENSION OF TIME IS ALSO APPLICABLE TO TENNESSEE. IF OUR ASSUMPTION IS INCORRECT, RESPECTFULLY REQUEST THAT THIS TELEGRAM BE CONSIDERED AS A REQUEST BY TENNESSEE FOR AN EXTENSION OF TIME UNTIL AUGUST 15, 1958 FOR FILING A PETITION FOR REHEARING. A COPY OF THIS TELEGRAM IS BEING MAILED TO ALL PARTIES =

HARRY S LITTMAN ATTORNEY FOR TENNESSEE GAS TRANSMISSION CO =

RECEIVED

12401 12403 15 1958 15 1958 July 10 1958

[fol. 708] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,401

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioner,

vs.

FEDERAL POWER COMMISSION, Respondent.

No. 12,403

LONG ISLAND LIGHTING COMPANY, PUBLIC SERVICE ELECTRIC AND GAS COMPANY, Petitioners,

vs.

FEDERAL POWER COMMISSION, Respondent.

Present: Kalodner, Staley and Hastie, Circuit Judges.

ORDER GRANTING MOTION OF RESPONDENT FOR ENLARGEMENT OF TIME FOR FILING PETITION FOR REHEARING—July 16, 1958

Upon consideration of the motion by the respondent in the above-entitled cases;

It is Ordered that the time for filing respondent's petition for rehearing be, and it is hereby extended to August 15, 1958.

By the Court,
/s/ Kalodner, Circuit Judge.

July 16, 1958

[fol. 709] Respondent's Petition for rehearing covering 13 pages filed July 22, 1958 omitted from this print.

It was denied, and nothing more by order: August 27, 1958.

[fol. 710] Producer-Intervenor's Petition for rehearing covering 22 pages filed August 14, 1958 omitted from this print.

It was denied, and nothing more by order: August 27, 1958.

[fol. 711] Intervenor's (Tennessee) Petition for rehearing covering 9 pages filed August 15, 1958 omitted from this print.

It was denied, and nothing more by order: August 27, 1958.

[fol. 712] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12401 and 12403

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, et al., Petitioners,

vs.

FEDERAL POWER COMMISSION, Respondent.

Present: Goodrich, Staley and Hastie, Circuit Judges

ORDER DENYING PETITIONS FOR REHEARING—August 27, 1958

After due consideration the petitions for rehearing in the above-entitled case are hereby denied.

By the Court, Staley, Circuit Judge.

Dated: August 27, 1958.

[fol. 713] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,401

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, Petitioner,

vs.

FEDERAL POWER COMMISSION, Respondent.

No. 12,403

LONG ISLAND LIGHTING COMPANY, PUBLIC SERVICE ELECTRIC AND GAS COMPANY, Petitioner,

vs.

FEDERAL POWER COMMISSION, Respondent.

ORDER STAYING MANDATE—September 2, 1958

Upon Application of the Atlantic Refining Company, Cities Service Production Company, Continental Oil Company, and Tidewater Oil Company, Intervenors in the above entitled causes, for a Stay of Execution of the Judgment and Mandate of the Court of Appeals for the Third Circuit submitted pursuant to Rule 36(2) of the rules of [fol. 714] this Court, to enable them to apply for and obtain a Writ of Certiorari from the Supreme Court of the United States,

It is ordered that the Execution and Enforcement of said Judgment and Mandate of this Court in the above entitled cause, be and it hereby is stayed until the 2d day of October, 1958, to enable said Intervenors to apply

for and obtain a Writ of Certiorari from the Supreme Court of the United States.

Staley, Circuit Judge.

Dated: 9-2-58

[fol. 715] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 716]

SUPREME COURT OF THE UNITED STATES

Nos. 518 and 536, October Term, 1958

THE ATLANTIC REFINING COMPANY, CITIES SERVICE PRODUCTION COMPANY, CONTINENTAL OIL COMPANY, et al., Petitioners,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, LONG ISLAND LIGHTING COMPANY, et al.; and

TENNESSEE GAS TRANSMISSION COMPANY, Petitioner,

vs.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, LONG ISLAND LIGHTING COMPANY, et al.

ORDER ALLOWING CERTIORARI—January 12, 1959

The petitions herein for writs of certiorari to the United States Court of Appeals for the Third Circuit are granted. The cases are set for argument immediately following No. 288 and a total of three hours is allowed for oral argument of all of these cases.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Frankfurter took no part in the consideration or decision of these applications.

FILE COPY

Office Supreme Court, U.S.
FILED
NOV 14 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 518

THE ATLANTIC REFINING COMPANY
CITIES SERVICE PRODUCTION COMPANY
CONTINENTAL OIL COMPANY
TIDEWATER OIL COMPANY, *Petitioners*

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK
LONG ISLAND LIGHTING COMPANY
PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Dated at Washington, D. C.
this 14th day of November, 1958.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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of this consideration, the Commission found that the matter of price at which the sales were to be made initially was outweighed by the desirability of attachment of the reserves to Tennessee's system (*infra*, p. 15a). In a further explanation of the exercise of its discretionary power, the Commission noted the existence of Section 5(a) rate investigations against three of the four Petitioners and concurrently instituted an investigation into the rates of the fourth, stating (*infra*, p. 16a):

> "By this means relief can be afforded to the consuming public if it should be found that the 21.4-cent initial rate to be charged for the off-shore gas is excessive."

Review was sought by the Public Service Commission of the State of New York, Long Island Lighting Company, and Public Service Electric and Gas Company. In their petitions for review, as in their applications for rehearing, they urged that the Commission erroneously exercised its discretion in refusing to attach rate reducing conditions to the certificates granted to Petitioners. The Court below summarized these contentions as follows (*infra*, p. 6a):

> "The petitioners pose substantially similar questions on the merits of the case, namely, whether the Commission committed error in its order of June 24 in dispensing with the consideration of the element of price because of the threat of the producers to withhold the gas from interstate commerce, after two previous determinations by the Commission that the sale should not be certificated without evidence in the record that the initial rate was just and reasonable."

But the Court below deliberately did not decide this question. Instead, it framed a different objection of

cate proceedings into rate cases whenever a question is raised as to initial price. Here, the opposite conclusion would be indirectly achieved by insinuating the view of the Court of Appeals for the Third Circuit that "the Commission probably should always consider the impact of the initial rate" at the time of certification (*infra*, p. 7a). This view of the Third Circuit "indicates the desirability of a ruling by this Court," as the Government succinctly put it in acquiescing in the granting of *certiorari* in *Oklahoma Natural*.[6]

Grave federal questions are raised by the decision below as to the scope of the statutory jurisdiction of the Federal Power Commission in its administration of the certificate provisions of the Natural Gas Act, and as to the statutory jurisdiction of a court of appeals in reviewing commission determinations thereunder.

The Court below held that a refusal by an applicant to accept a certificate containing a commission-imposed condition reducing the contract price deprives the Commission of its statutory jurisdiction to consider the application further on rehearing. In other words, it held that the Commission could not change its mind on rehearing and grant a certificate without such condition. Moreover, in total disregard of express Commission findings that it had weighed both price and demand considerations and concluded that "the price consideration should not be made the prime determinant of what the public convenience and necessity require," (*infra*, p. 15a) the Court below remanded the proceedings to the Commission with directions to proceed in conformity with the Court's view that the matter of the initial rate was here a "necessary considera-

[6] Memorandum for the Federal Power Commission, p. 2.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No.

THE ATLANTIC REFINING COMPANY
CITIES SERVICE PRODUCTION COMPANY
CONTINENTAL OIL COMPANY
TIDEWATER OIL COMPANY, *Petitioners*

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK
LONG ISLAND LIGHTING COMPANY
PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Come now The Atlantic Refining Company, Cities Service Production Company, Continental Oil Company and Tidewater Oil Company (Petitioners), intervenors in the proceedings below, and pray that a writ of *certiorari* issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in such proceedings on June 30, 1958.

OPINIONS BELOW

The Opinion of the Court of Appeals, entered June 30, 1958, is reported at 257 F. 2d 717. The Opinion and the Court's judgment entered the same day are reprinted herein as Appendix A (*infra*, pp. 1a-11a). The order of the Federal Power Commission, issued June 24, 1957, which was reversed by the Court below, is reported at 17 F.P.C. 880. For the convenience of the Court, it is reprinted herein as Appendix B (*infra*, pp. 12a-26a).

JURISDICTION

The Opinion and Order of the Court of Appeals for the Third Circuit were entered on June 30, 1958. Petitions for rehearing were denied on August 27, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1948) and Section 19(b) of the Natural Gas Act, 52 Stat. 831 (1938); 15 U.S.C. § 717r(b).

QUESTIONS PRESENTED

1. Must the Commission convert a certificate proceeding, under Section 7 of the Natural Gas Act, into a rate case when a question is raised as to the initial price?

2. In a certificate proceeding, can an applicant's refusal to accept a certificate conditioned to require a reduction in the contract sale price deprive the Commission of its statutory jurisdiction to consider the application further on rehearing?

3. Can a court of appeals vacate a certificate order because of its view that the Commission failed to recognize the initial rate as a necessary consideration in determining the public convenience and ne-

cessity, when such view is contrary to explicit findings delineating the Commission's consideration of the initial rate in relation to demand for gas and the Commission's conclusion that "the price consideration should not be the prime determinant"?

4. Where the statute conferring review jurisdiction on a court of appeals forbids it to consider any objection to an order not theretofore urged before the Commission in an application for rehearing, can the court vacate a commission order because of the court's view that the Commission lacked statutory jurisdiction to consider the application before it, an objection raised *sua sponte* by the court and not urged at any time by any party?

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821 (1938), as amended by 56 Stat. 83 (1942), 15 U.S.C. §§ 717-717w, are set forth in Appendix C hereto (*infra,* pp. 27a-33a).

STATEMENT OF THE CASE

The commission order under review, issued on June 24, 1957, granted certificates of public convenience and necessity to each of the Petitioners, authorizing each to sell natural gas to Tennessee Gas Transmission Company (Tennessee) in accordance with the terms of their respective applications (*infra,* p. 17a). The applications, in turn, were based upon separate contracts between each of the Petitioners and Tennessee.[1]

Factual Background.—Each Petitioner owns an undivided 25 per cent interest in leases covering 95,000

[1] Notwithstanding the separate status of each Petitioner, considerations of convenience lead to their joint presentation of this petition.

acres located in the Gulf of Mexico, 15 to 30 miles offshore Cameron and Vermilion Parishes, Louisiana (J.A. 23a-24a, 280a). Each sold its share of gas pursuant to separate contracts with the same purchaser, Tennessee (J.A. 21a, 286a). One of the Petitioners, Continental Oil Company, was designated as operator of the leases (J.A. 23a). Deliveries are made to Tennessee at platforms in the Gulf of Mexico (J.A. 25a). Tennessee transports the gas so received to a point of interconnection with its main transmission line near Kinder, Louisiana, for further transmission through its interstate system (J.A. 46a).

Under their contracts, Petitioners agreed to dedicate a total of two trillion cubic feet of natural gas to be produced from their offshore leases. At the time of the hearing, reserves amounting to 1.673 trillion cubic feet of gas had been proven on only 11 per cent of the dedicated acreage (J.A. 33a-38a, 122a, 282a, 285a). Taken together, the contracts provide for the enormous delivery to Tennessee of approximately 240 million cubic feet of natural gas per day for 20 years.

The initial price under the contracts is 21.4¢ per Mcf.[2]

Proceedings Below.—Hearings were held upon Petitioners' applications, participated in by the Public Service Commission of the State of New York, Long Island Lighting Company, and Public Service Electric and Gas Company. They did not question the showing that Petitioners were "able and willing" to perform the service proposed. They questioned only whether the proposed sales were required by the public

[2] The price of 21.4¢ per Mcf is exclusive of Louisiana gas gathering tax reimbursement. Throughout this Petition, all prices referred to are exclusive of such tax reimbursement.

convenience and necessity unless conditions were attached to the requested certificates reducing the initial price fixed by the contracts. They presented no witnesses and no evidence in support of their contention (J.A. 264a-265a).

Thereafter, the Presiding Examiner who received the evidence issued his initial decision which granted certificates to the Petitioners in accordance with their applications. Upon exceptions, the Commission issued on April 22, 1957, the first of three successive orders in these proceedings. After adopting findings of the Presiding Examiner that there is a need for the gas on the Tennessee system and that the Petitioners are ready and able to deliver—findings which the Commission held "argue conclusively that the sale is necessary in the public interest"—the Commission issued temporary authority to the Petitioners to make the sale (J. Pet. for Rev. No. 12,403, Ex. E, p. 59). The Commission also remanded the proceedings to the Presiding Examiner to determine "at what rate the public convenience and necessity requires the sale of natural gas by CATCO[3] to Tennessee Gas to be made" (*id.*, p. 62; footnote added). The Commission cautioned, however, that its action did not imply that the contract rates were not in the public interest (*id.*, p. 59).

The Petitioners filed an application for rehearing of the April 22 order, noting that because of the unsettled state of the law and applicable precedents to be used in producer rate determinations, acceptance of such certificates and procedure would constitute an undue busi-

[3] This abbreviated reference to Petitioners is derived from the initial letters in their names, Cities Service Production Company, The Atlantic Refining Company, Tidewater Oil Company, and Continental Oil Company.

ness risk which Petitioners could not accept (J.A. 399a). Subsequently on May 20, 1957, the Commission issued the second of its three orders. By this order, the Commission modified its earlier order, withdrawing the grant of temporary authorizations to the Petitioners and substituting "permanent" certificates (J. Pet. for Rev., No. 12403, Ex. F, pp. 64-71). To these, the Commission attached a condition requiring Petitioners to amend their contracts with Tennessee to reduce the initial rate from 21.4¢ per Mcf to 17¢ per Mcf. This second order was further conditioned to require contract amendments enabling the Petitioners to file for an increase to 21.4¢ per Mcf, effective one day after commencement of deliveries. The Commission also indicated that such increase would be suspended for a period of 24 hours before being allowed to become effective subject to refund.

Petitioners notified Tennessee that they could not accept certificates so conditioned (J.A. 418a).[4] Tennessee then filed an application for rehearing and requested oral argument which was subsequently held before the Commission sitting *en banc* (J.A. 416a-423a, 424a-427a). Thereafter, the Commission issued its order of June 24, 1957, which is the only order here under review, granting certificates to Petitioners without any rate reducing conditions (*infra*, pp. 12a-26a). After reviewing the procedural history, the Commission set forth the reasons which impelled it to grant the certificates without rate reducing conditions, making it clear that it considered the primary basis for its decision to be the great need for the gas supplies on behalf of the public served by the Tennessee system. Because

[4] This act was characterized by the Court below as a "threat" to the Commission (*infra*, p. 5a).

its own to the Commission's order, not urged before the Commission for its primary consideration and not advanced in argument or brief before the Court. This new issue, and the only one decided by the Court below, concerned an entirely novel question of the Commission's "statutory jurisdiction." The Court said (*infra*, p. 6a):

> "We conceive of the question, however, as a more fundamental one, involving the *statutory* jurisdiction of the Federal Power Commission. It is whether the Commission has authority to consider an application for a certificate under Section 7(e) where the terms of the application limit the scope of the inquiry which the Commission is required to make for a determination of public convenience and necessity" (italics supplied).

Then, declining to reach the question presented by the petitions for review as to whether the Commission abused its discretion in refusing to attach a rate condition (*infra*, p. 7a), the Court concluded that Petitioners' refusal to accept conditional certificates deprived the Commission of its "statutory jurisdiction" to consider the price element of the certificate applications. On this objection, raised *sua sponte*, the Court reversed the Commission's June 24 order.

REASONS FOR GRANTING THE WRIT

This case presents the other half of the central question involved in *Oklahoma Natural Gas Company* v. *Federal Power Commission*, where this Court granted *certiorari* on November 10, 1958.[5] There, the Court of Appeals for the District of Columbia Circuit had sustained a commission refusal to convert certifi-

[5] No. 288, October Term, 1958.

tion in the scope of inquiry into the determination of public convenience and necessity" and that the Commission had left no doubt of the "importance and necessity of a consideration of the *reasonableness* of the proposed initial rate" (*infra*, pp. 10a, 7a; italics supplied).[7]

Thus, the Court below unlawfully circumscribed the statutory jurisdiction of the Commission, and in so doing invaded the Commission's province by substituting its own judgment for administrative determination of the Commission.

The foregoing errors are compounded by the fact that, contrary to express prohibition in the statute conferring review jurisdiction upon it, the Court below based its determination solely on its own objection, raised *sua sponte*, to the Commission's order under review. It conceived of the question before it as one whether the Commission has statutory jurisdiction to consider a certificate application conditioned to limit the scope of the Commission's inquiry, the Court asserting, contrary to the record facts, that the applications were so conditioned. Manifestly, the Court below violated restrictions on its statutory jurisdiction in considering such objection, *sua sponte*.

The decision below is in conflict with applicable decisions of this Court. This request for review presents several publicly important questions of interpretation of the Natural Gas Act calling for delineation by this Court of the statutory jurisdiction of the Commission and the reviewing court, respectively.

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[7] A fair paralleling of the Commission's findings and the Court's opinion irrefutably shows that the Commission did consider deliberately the matter of price and suggests that the Court was dissatisfied—not because of the lack of such consideration—but with the result thereof.

I.

Effect of Decision Below Upon Administration of the Natural Gas Act

Employment of the rationale of the Court below in administration of the Natural Gas Act would result in administrative chaos. The main thrust of the decision below is a judicial drive toward imposition of an administrative policy requiring the Commission to determine the reasonableness of the initial rate whenever a price question is raised in a certificate proceeding.

Preliminarily, it should be pointed out that the Commission has consistently held it administratively unwise and unworkable to convert producer certificate proceedings into rate proceedings, determining the justness and reasonableness of the producer contract rates.[6] Such interpretation of its authority by the Commission must be given considerable weight. *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933); *Signal Oil and Gas Co.* v. *Federal Power Commission*, 238 F.2d 771, 774 (C.A. 3, 1956).

Out of literally thousands of producer applications coming before it, in only one case has the record been such as to lead the Commission to attach a rate reducing condition, this exception being the so-called

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[6] *Re Anthony J. Tamborello*, 14 F.P.C. ——, 11 PUR 3d 413 (1955); *Re Cities Service Gas Company*, 14 F.P.C. ——, 12 PUR 3d 3 (1955); *Re Natural Gas Pipeline Company of America*, 16 F.P.C. 80, 16 PUR 3d 277 (1956); *Re Seaboard Oil Company*, 19 F.P.C. 416, 23 PUR 3d 1 (1958); *Re Hope Natural Gas Company*, 19 F.P.C. 405 (1958); *Re Superior Oil Company*, 19 F.P.C. 637; *Re Sunray Mid-Continent Oil Company*, 19 F.P.C. 618; *Re Texaco Seaboard, Inc.*, 20 F.P.C. ——, Opinion No. 315, issued September 4, 1958.

Signal case.[9] There, the Commission was careful to point out that it was not prescribing the "just and reasonable" rate, stating (15 F.P.C. 1020, 1021):

> "We do not hold that the issue of rates in a certificate proceeding is identical in scope and effect with that in a section 4 and section 5 proceeding. The rate we deem proper to be charged if a certificate should issue is not necessarily the same we could find to be the lowest reasonable rate under Section 5. Criteria for prescribing a rate necessarily differ from criteria for proscribing a rate."

The Commission expressed similar considerations as controlling its decision to issue certificates without determining the "just and reasonable" rate in other producer certificate proceedings. Thus, in the *Tamborello* case, decided the same day when the *Signal* opinion issued, the Commission held on rehearing that [15 F.P.C. 1, 3; (1956)]:

> "Adoption of the contentions of applicants for rehearing would require that prior to issuance of any certificate of public convenience and necessity authorizing the sale of natural gas in interstate commerce for resale we enter upon the equivalent of a complete section 5 investigation and, on the basis of the evidence adduced, determine the 'lowest reasonable rate'. The rate so determined would then be imposed by a condition attached to the certificate. Such holding would not only be contrary to the plain language of the act but would also prevent us from exercising the judgment and discretion delegated to us by Congress. Reasonable regulation of natural gas companies,

[9] *Re Cities Service Gas Company*, 14 F.P.C. ——, 12 PUR 3d 3, reh. den., 15 F.P.C. 1020, aff'd, *sub. nom., Signal Oil and Gas Company* v. *Federal Power Commission*, 238 F. 2d 771 (C.A. 3, 1956), *cert.* den., 353 U.S. 923 (1957).

whether interstate pipeline transmission companies or independent producers, requires that our decisions and determinations be the result of a conscientious appraisal of evidence adduced, having regard for the interest of all who may be affected thereby and our determination of the requirements of public convenience and necessity in the circumstances."

The Commission has been consistent in its refusal to convert certificate proceedings into rate cases. This is exactly the conclusion reached in *Oklahoma Natural Gas Company* v. *Federal Power Commission*, 257 F. 2d 634 (C.A.D.C., 1958); *Florida Economic Advisory Council* v. *Federal Power Commission*, 251 F.2d 643 (C.A.D.C. 1957). Even though the intervenors in *Oklahoma Natural*, unlike the intervenors in our case, did present evidence respecting the impact of the contract price, the Commission declined in its discretion to attach a rate condition. *Re Natural Gas Pipeline Company of America*, 16 F.P.C. 80, 91-92 (1956).

Referring to the decision in *Oklahoma Natural*, the Court below stated here (*infra*, p. 7a):

> "While the Commission probably should always consider the impact of the proposed initial rate in its determination of public convenience and necessity, we do not reach the question of whether the Commission must fix the initial rate when its inquiry demonstrates that there is a substantial question of the reasonableness of that initial rate. See *Oklahoma Natural Gas Co.* v. *Federal Power Commission*, and the dissenting opinion of Judge Bazelon, D. C. Cir., 257 F. 2d 634, 642."

In short, the Court below asserts that it does not reach the question whether, because of the force of Section

4(a) of the Act,[10] the Commission must in *every* certificate case determine whether the initial rate is "just and reasonable." But it significantly states that "the Commission probably should always consider the impact of the proposed initial rate" at the time of certification. Immediately thereafter, the Court below proceeds to state its view that, in the instant case, the Commission has left no doubt of the "importance and *necessity* of a consideration of the *reasonableness*,[11] of the proposed initial rate" (italics and footnote supplied; *infra*, p. 7a).

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[10] Section 4(a) provides [52 Stat. 822 (1938); 15 U.S.C. 717(c) (1952)]; "All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful."

[11] To the same effect is another error in the statement of the Court below that (*infra*, p. 7a):

> "When the Signal Oil case was before the Commission, it said that the *justness and reasonableness* of the rate was a 'vital element' in demonstrating 'that the service proposed is or will be required by the present or future public convenience and necessity.'" *Cities Service Gas Co., et al*, 12 P.U.R. 3d 3, 14 (1955)" (italics supplied).

The Commission said no such thing. It dealt with the certificate standard, not the rate standard. The exact language in *Signal* used by the Commission, which was paraphrased by the Court in the above question, is (12 PUR 3d 3, 14):

> "In this, a proceeding upon a certificate application, Signal as applicant-seller has the burden of proving all elements of its application so that we may conclude that the service proposed is or will be required by the present or future public

Moreover, it should be noted that, in the experience of more than four years of regulation, the Commission has not yet approved any criteria for determining just and reasonable rates for producers. Commonly, several years are currently being required for the processing of a rate case through the Commission's administrative machinery. Producer certificate proceedings, we submit, cannot wait that long. Obligations to leasehold interests and simple economic necessity preclude such prolongation. The need of consumers for new gas supplies also requires more expeditious certification.

In short, public interest forbids turning certificate proceedings into rate proceedings, a night-follows-day sequel to the decision below.[12]

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convenience and necessity. A vital element of such proof is concerned with the rates proposed."

Indeed, the Commission expressly stated that it was not determining the "justness and reasonableness" of rates in *Signal* (12 PUR 3d 3, 14):

> "[We] do *not* purport to determine the *just and reasonable* rate within the meaning of § 4 (italics supplied).

Additionally, the Commission noted in *Signal* (12 PUR 3d 3, 16-17):

> "A proceeding [under Section 7(c) of the Act] cannot and is not intended to take the place of a proceeding under §§ 4 or 5 of the act."

[12] In a recent demonstration why it is neither necessary nor desirable to convert every certificate proceeding into a rate proceeding, the Commission said that this would result in bringing "to a virtual halt the granting of certificate applications both to independent producers and pipelines whose applications are dependent on the certification of such sales." *Re Transcontinental Gas Pipe Line Corporation, et al.*, Docket Nos. G-13143, *et al.*, Order Denying Applications for Rehearing, mimeo ed. p. 4, issued Oct. 31, 1958.

II.

The Court Below Erroneously Restricted the Statutory Jurisdiction of the Commission.

The one clear holding below is that the Commission was ousted from its statutory jurisdiction to consider an application where the applicants indicated an unwillingness to accept certificates with a condition reducing the contract price. The Court said (*infra*, pp. 10a-11a):

> "Congress has not given the Commission power to inquire into the issue of public convenience and necessity where, as here, the applicant circumscribes the scope of that inquiry by attaching a condition to its application requiring the Commission to forego the consideration of an element which may be necessary in the formulation of its judgment.
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> * * * * *
>
> "The action of the applicants in curtailing the decision-making power of the Commission demonstrates their unwillingness to conform to the provisions of the Act; this in itself would require the denial of the applications."

These conclusions seemingly stem from the fact that Petitioners indicated to Tennessee their unwillingness to accept certificates, issued by the May 20 order, conditioned to require a reduction in the contract price from 21.4¢ to 17¢. The Court concluded that this deprived the Commission of jurisdiction to consider further the applications of Petitioners.

Basic to its decision is an apparent misconception by the Court that Section 7 of the Act requires an applicant to agree in advance to accept any certificate which might be issued to it. The fact that the Petitioners did

not accept the conditional certificates was interpreted by the Court as a "threat"[13] which circumscribed the Commission's inquiry by "attaching a condition" to the applications, thus somehow limiting the Commission's "statutory jurisdiction."

Let it first be made clear that, wholly contrary to the statement in the decision below, there was no condition attached to any of the applications. Nor can it be said that the request of Petitioners for certificates conforming to their contracts implied a "condition" to the applications "requiring the Commission to forego the consideration of an element which may be necessary in the formulation of its judgment." For such a request does no more than present the nature of the *proposal* of applicants to be weighed by the Commission against the totality of the requirements of the public convenience and necessity.

Even if this were not so, the Court plainly erred in supposing that a conditional application could "limit" the statutory jurisdiction of the Commission. It held that "the Commission has not been endowed by Congress with jurisdiction to conduct a *limited* inquiry". (Court's italics; *infra*, p. 11a). But a request for a

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[13] The 'threat' characterization is four times employed by the Court below (*infra*, pp. 5a, 8a, 8a note 6, 10a). Each time, it used the term to describe the undeniable right of Petitioners to commit, or decline to commit, their reserves to interstate service under a certificated sale. For example, the Court said (*infra*, p. 8a):

> "It was only after the threat of withholding the gas from the interstate market that the Commission retreated from its previous position and granted the certificates without rate condition by its order of June 24, 1957."

certificate without a rate reducing condition in no sense limits the Commission's inquiry into the price aspects of such a proposal, along with all other elements entering into the complex of public convenience and necessity. And that is exactly the process delineated by the Commission in its order under review from which it drew its ultimate conclusion (*infra*, p. 15a):

> "We are of the opinion that, in the circumstances of this case, in view of the great demand for gas by customers of Tennessee Gas, the price consideration should not be made the prime determinant of what the public convenience and necessity require."

Petitioners' request for certificates conforming as to price with the proposals in their applications are not unlike, in principle, a request for certificate authorization for a period limited to agree with the term of the basic sales contract. A Commission holding that it lacked jurisdiction to grant a certificate so limited was reversed on review in *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 239 F. 2d 97 (C.A. 10, 1956). When this Court reversed on other grounds, it noted that the Commission, in the Supreme Court, agreed with the Court of Appeals that it did have jurisdiction to issue a certificate of limited duration. 353 U.S. 944 (1957). Obviously, the Commission has jurisdiction to consider an application for a limited certificate, just as it has jurisdiction to consider an application for a certificate without a rate reducing condition.

The view of the Court below that Section 7 required an applicant to agree in advance to accept any certificate which might be issued to it necessarily proceeds on a premise that a certificate applicant cannot request

the issuance to it of a certificate in accordance with its proposal without depriving the Commission of jurisdiction to consider its proposal. In other words, as viewed by the Court, the Act requires an applicant to commit itself to accept any certificate issued, no matter how conditioned or how much at variance with the sale it proposes. This fallacy carries through to the conclusion of the opinion of the Court below where this remarkable deduction is set forth (*infra*, p. 11a):

> "The action of the applicants in curtailing the decision-making power of the Commission demonstrates their unwillingness to conform to the provisions of this Act; this in itself would require denial of the applications."

An applicant has no obligation—under statute, regulation, or otherwise—to accept a certificate containing a condition which the applicant deems unreasonable or otherwise unacceptable. An applicant's right to reject a proffered certificate is a freedom provided under the statutory scheme as an equitable concomitant for the conditioning power vested in the Commission by Section 7(e) of the Act. In practice, every producer-applicant requests a certificate exactly as set forth in his application. In this case, Petitioners sought certificate authorization merely to make the sales as provided for in their contracts. This harmonizes with the function of privately negotiated contracts in the scheme of regulation under the Act. *Cf., United Gas Pipe Line Company* v. *Mobile Gas Service Corporation*, 350 U.S. 332 (1956). In light of *Mobile*,[14] how could it be

[14] In *Mobile*, this Court recognized that the contract between the parties is the foundation block upon which rests the Commission's rate-reviewing powers, saying (350 U.S. at 341):

> "Recognizing the need these circumstances create for individualized arrangements between natural gas companies and

said that Petitioners' request for their contract price as the initial rate deprives the Commission of jurisdiction to consider their applications and affix such reasonable conditions as it might consider to be in the public interest?

Moreover, an applicant's right to accept or reject a certificate is expressly contemplated by the Commission's certificate regulations.[15]

Similarly, in accordance with usual practice in administration of the Act, the order here under review provided expressly for "acceptance", an act of surplusage if an applicant were powerless to reject (*infra*, p. 19a). If the Court below were right in supposing an

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distributors, the Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public.

* * * * * *

"Moreover, the very premise that §§ 4(d) and (e) and 5(a) are alternative rate-changing 'procedures' is itself based on a misconception of the structure of the Act. These sections are simply parts of a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all rates are subject to being modified by the Commission upon a finding that they are unlawful. *The Act merely defines the review powers of the Commission and imposes such duties on natural gas companies as are necessary to effectuate those powers; it purports neither to grant nor to define the initial rate-setting powers of natural gas companies*" (italics supplied).

Since privately negotiated contracts form the basis for the Commission's rate authority, it is at least anomalous that the Court below should attach the labels of "threat" and "unwilling sellers" to Petitioners' request for certificates in accordance with the terms of their contracts.

[15] 18 CFR 157.20.

applicant unable to reject a certificate, the Commission could have compelled acceptance of the May 20 order reducing the initial rate to 17¢. Contrary to any such supposition, however, that order also expressly provided for "acceptance" (J. Pet. for Rev., No. 12,403, Ex. F, p. 71).

Any implication that a certificate applicant must agree in advance to accept whatever certificate the Commission might issue, regardless of the conditions attached, is contrary to the underlying philosophy of the Natural Gas Act. *Cf., Central West Utility Company* v. *Federal Power Commission,* 247 F. 2d 306 (C.A. 3, 1956). The detrimental effect of such a rule is manifest. No seller would willingly commit his reserves to the interstate market if forced to proceed on such a "grab-bag" basis. The inevitable results will operate adversely to the ultimate consumers through curtailment of supplies available for the interstate market.

The established governing principle was recently expressed as follows by one of the Commission's Presiding Examiners:[16]

> "The filing of an application for a certificate does not of itself create a legal obligation to accept such a certificate tendered by the Commission. Neither can such filing create a moral obligation if the applicant is asked to accept a certificate which varies in the slightest from the form of certificate sought by the applicant."

The holding that Petitioners' request for certificates conforming to their contracts divested the Commis-

[16] *Re Sunray Mid-Continent Oil Company,* Docket Nos. G-4916, *et al.,* Decision issued October 21, 1958.

sion of its statutory jurisdiction to consider their applications eats away at the foundation of the regulatory scheme provided by Congress as interpreted in *Mobile*. It proceeds on a manifest fallacy that an applicant irretrievably commits himself to accept whatever certificate issues. The consequences flowing from this error will be far reaching and should be avoided through review by this Court.

III.

The Court Invaded the Administrative Province of the Commission

The freedom of an applicant to accept or reject any certificate offered certainly does not and cannot foreclose consideration by the Commission of any issue it deems essential in reaching its public convenience and necessity determination. It is affirmatively clear that the Commission was not so restricted here, for it expressly weighed the element of price, saying (*infra*, p. 15a):

> "In the present status of the case we are left with the difficult problem of how to assure the delivery of gas to the large market served by Tennessee Gas, and at the same time protect the consumers from an unreasonably high price. *In reaching a solution to this problem we are moved by the primary consideration that the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas. Further, it appears to us, important as is the issue of price, that as far as the public is concerned, the precise charge that is made initially is less important than the assurance of this great supply of gas.* In view of these circumstances and the fact that the record does not show that the 21.4-cent rate is necessarily excessive, we agree with the presiding ex-

aminer that this certificate proceeding under Section 7 of the Natural Gas Act should not assume the character of a rate proceeding under Section 5(a). *We are of the opinion that, in the circumstances of this case, in view of the great demand for gas by customers of Tennessee Gas, the price consideration should not be made the prime determinant of what the public convenience and necessity require.* By virtue of the authority conferred upon us by Sections 4 and 5 of the Natural Gas Act and the proposal to modify the contracts made by the CATCO companies, we are of the opinion that we will be able to adequately protect the public interest with respect to the matter of price. In order, therefore, to insure that deliveries of gas by the four CATCO companies to Tennessee Gas will commence as promptly as possible, we will grant permanent certificates to them by this order without any condition affecting the initial price of 21.4 cents per Mcf" (italics supplied).

Disregarding entirely these findings in the only order under review, the Court below would drive the Commission to a determination of the "reasonableness" of the initial rate, as we have already shown (*supra*, pp. 11-15).

In so doing, the Court quoted extensively from earlier orders not under review, orders abandoned by the Commission in its administrative determination of the public convenience and necessity requirements (*infra*, pp. 3a-5a).

Reversal of the Commission's order for an asserted failure to consider the matter of price in the face of the explicit findings therein constitutes a manifest substitution of judicial judgment for the administrative judgment of the Commission. For it is obvious that

what the Commission did was to consider the matter of price along with other factors. Exercising its discretion, the Commission concluded that the public interest would be served by encouraging dedication of the large gas reserves involved to the interstate market, and merely postponing its determination whether the contract rate was just and reasonable. The Commission was supported in this conclusion by the recognized fact that there was no indication that the contract rate was excessive (*infra*, p. 15a). And it was, in any event, confronted with the sort of record usual to a certificate proceeding in that there was a total absence of evidence upon which to determine the "just and reasonable" rate, since the opposing intervenors offered no evidence in support of their rate contentions.

On the basis of the record, the Commission, exercising its discretionary power, decided not to attach rate reducing conditions to the certificates. This final determination was predicated upon the complex of elements comprising the public convenience and necessity.[17] Plainly, in refusing to recognize the explicit findings of the Commission and substituting its judgment for that of the Commission, the Court below erred. *Gray* v. *Powell*, 314 U.S. 402 (1941); *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515 (1946). Correlatively, since the Act provides alternative methods of regulation—a reasonable rate condition under Section 7 where supported by the record, or a rate proceeding under Section 5—responsibility for

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[17] Undoubtedly, the reviewing court must address itself to the order under review, for it is immaterial that the Commission may have reached a different conclusion upon the same record in an earlier order. *Cia Mexicana de Gas* v. *Federal Power Commission*, 167 F. 2d 804, 806-807 (C.A. 5, 1948).

selecting the means of achieving the statutory policy and the relation of remedy to policy are matters peculiarly with the Commission's discretion. *American Power & Light Company* v. *Securities and Exchange Commission*, 329 U.S. 90, 112 (1946); *Phelps Dodge Corporation* v. *National Labor Relations Board*, 313 U.S. 177, 194 (1941); *cf.*, *Federal Power Commission* v. *Idaho Power Company*, 344 U.S. 17, 21 (1952).

The Court below usurped the administrative discretion reserved by Congress to the Commission. In so doing, it violated its own accurate statement of the governing fundamental requirements (*infra*, p. 10a):

> "The Act entrusts to the Commission, and to the Commission alone, the power and authority to determine the issue of public convenience and necessity. Within the framework of the Natural Gas Act, the Commission alone is entrusted with determining the scope of its inquiry necessary to arrive at the decision of whether to certificate a specific sale."

IV.

The Court Exceeded Its Statutory Authority in Basing Its Determination on an Objection Raised Sua Sponte

It is clear that the Court below exceeded its statutory authority, when it departed from the objections urged by the parties and based its determination on an objection to the Commission's order, raised *sua sponte*. For it is settled law that statutory review provisions, such as those in Section 19 of the Natural Gas Act,[18] contain "a distinctive formulation of the conditions under which resort to the courts may be made and Congress determines the scope of jurisdiction of the

[18] 52 Stat. 831 (1938); 15 U.S.C. § 717r.

lower federal courts." *Federal Power Commission* v. *Pacific Power & Light Company*, 307 U.S. 156, 159 (1939).

Section 19 (b) is explicit in limiting the jurisdiction of a court of appeals to review commission orders. One such express limitation is:

> "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do."

In their applications for rehearing, opposing intervenors before the Commission urged a number of objections, largely dealing with claims that the Commission abused its discretion in declining to attach to the certificates a condition reducing rates (J.A. 447a-474a). None even suggested that the Commission lacked "statutory jurisdiction" in any respect to entertain or act upon the certificate applications before it. Nor did they advance any such claim in their petitions seeking review by the Court below. Ignoring entirely the objections which had been urged before the Commission, the Court below conceived of the sole issue before it as one dealing with the "statutory jurisdiction" of the Commission "to consider an application for a certificate under Section 7(e) where the terms of the application limit the scope of the inquiry which the Commission is required to make for a determination of public convenience and necessity." But its conclusion that the Commission lacks such "statutory jurisdiction" constitutes an objection to the Commission's order which had not theretofore been urged before the Commission in an application for rehearing. This directly contravenes the plain terms of the limit-

ing provisions of the Act of Congress determining the scope of the jurisdiction of the court below. Section 19(b).

The courts have rigorously applied the limitations in Section 19(b). Thus, a reviewing court is powerless to resolve a case before it on objections raised *sua sponte*, even if it were to apply correct principles in disposing of those objections. *Federal Power Commission* v. *Colorado Interstate Gas Company*, 348 U.S. 492 (1955); *cf.*, *City of Pittsburgh* v. *Federal Power Commission*, 237 F. 2d 741, 749 (C.A.D.C., 1956); *Magnolia Petroleum Company* v. *Federal Power Commission*, 236 F. 2d 785, 789 (C.A. 5, 1956); *Memphis Light, Gas and Water Division* v. *Federal Power Commission*, 243 F. 2d 628, 632 (C.A.D.C., 1957).

In *Colorado Interstate*, this Court left no doubt that the foregoing limitation in Section 19(b) is to be strictly enforced. Reversing the court of appeals which had considered, *sua sponte*, an objection which had not been urged before the Commission, this Court held (348 U.S. at 498-499):

> "Respondent's second and principal contention is that although its application did not meet the requirements of § 19(b) and *it* therefore is barred from attacking the validity of the merger conditions in the Court of Appeals, nothing precludes that court itself from raising, considering and sustaining the same objection, *sua sponte*. Respondent's error appears on the face of the statute. Section 19(a) first precludes the *bringing* of any proceeding in a Court of Appeals to review an order of the Commission, *unless the person bringing it previously has applied to the Commission for a re-hearing on that order*. Section 19(b) then expressly precludes the *consideration* by the court

> of any objection to an order of the Commission, *unless the objection shall have been urged before the Commission in the application for rehearing.* As the court is thus expressly *precluded from considering* an objection when, without prior application to the Commission, that objection is presented to the court by the party directly aggrieved, it cannot be assumed that Congress intended to *permit* the same court to consider the same objection, under the same circumstances, *sua sponte,* merely because the objection was *not* presented to the court by the party aggrieved. Section 19(b) reflects the policy that a party must exhaust its administrative remedies before seeking judicial review. To allow a Court of Appeals to intervene here on its own motion would seriously undermine the purpose of the explicit requirements of § 19(b) that objections must first come before the Commission" (Court's italics).

Similarly, in *Panhandle Eastern Pipe Line Company* v. *Federal Power Commission,* 324 U.S. 635, 649-651 (1945), this Court held that the company's failure in its application for rehearing to question the Commission's jurisdiction to include producing properties in its rate base precluded the reviewing court's consideration of that question.

Strikingly in point is the decision in *American Power and Light Company* v. *Securities and Exchange Commission,* 141 F. 2d 606 (C.A. 1, 1944), aff'd., 329 U.S. 90 (1946), where the Securities and Exchange Commission, pursuant to Section 11(b)(2) of the Public Utility Holding Company Act,[19] had issued orders requiring dissolution of two subsidiaries of Electric Bond & Share Company. Review was sought pursu-

[19] Section 11(b)(2) of the Act of August 26, 1935, 49 Stat. 820, 15 U.S.C. § 79k(b)(2).

ant to Section 24(a) of the Public Utility Holding Company Act,[20] which is substantially identical with Section 19(b) of the Natural Gas Act, providing that:

> "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission. * * *."

In their brief before the court, petitioners there sought to raise for the first time a question whether Section 11(b)(2), as a matter of statutory interpretation, authorizes the dissolution of subholding companies as one method of bringing a holding company system into compliance. The court held that it had no power to review the question, stating (141 F. 2d at 613):

> "[T]here can be no doubt that under § 24(a) petitioners were obliged to raise before the Commission issues as to *the Commission's statutory authority* to issue the contemplated orders" (italics supplied).

Compare the decision below. Passing objections raised by Petitioners, the Court turned to its own objection dealing with "the Commission's statutory authority" to grant the applications and decided the cases solely on that issue.

Clearly, the Court below exceeded its own jurisdiction under the Act in basing its determination upon an objection not urged before and not primarily considered by the Commission, and not urged before the Court.

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[20] Section 24(a) of the Act of August 26, 1935, 49 Stat. 834, as amended, 15 U.S.C. 79x.

V.

Conclusion

For all of the foregoing reasons, it is urged that this petition for a writ of *certiorari* be granted.

Respectfully submitted,

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Dated at Washington, D. C.
this 14th day of November, 1958.

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 12,401

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioner*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

No. 12,403

LONG ISLAND LIGHTING COMPANY, PUBLIC SERVICE ELECTRIC AND GAS COMPANY, *Petitioners*,

v.

FEDERAL POWER COMMISSION, *Respondent*.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL POWER COMMISSION

Argued March 21, 1958

Before KALODNER, STALEY and HASTIE, *Circuit Judges*.

Opinion of the Court

(Filed June 30, 1958)

By STALEY, *Circuit Judge*.

Serious questions involving the authority of the Federal Power Commission are presented in these petitions to review an order of the Commission granting certificates

of public convenience and necessity pursuant to Section 7(e) of the Natural Gas Act, 15 U.S.C. § 717f(e).

Oil leases in the Gulf of Mexico off the shore of Cameron and Vermilion parishes in Louisiana are owned by four independent producers of natural gas, Cities Service Production Company, The Atlantic Refining Company, Tidewater Oil Company, and Continental Oil Company. They are referred to collectively as the CATCO companies. In the early part of September, 1956, CATCO applied to the Federal Power Commission for certificates of public convenience and necessity for authority to sell their natural gas to Tennessee Gas Transmission Company, pursuant to contracts executed in August, 1956. Later in September, 1956, Tennessee Gas itself applied for a certificate of public convenience and necessity for authority to expand its facilities in preparation for the purchase of the gas from CATCO.

The contracts between the CATCO producers and Tennessee Gas provided for an intial rate of 22.4 cents per Mcf (including one cent gathering tax reimbursement), with an automatic increase of two cents every four years thereafter. The highest rate Tennessee Gas had previously paid for natural gas in the area was 18 cents per Mcf. The offshore gas fields in question represent the largest reserve ever committed to one sale, and the sale proposed is the first from the newly developed fields which will provide impressive proportions of future gas supply.

Hearings were begun on the CATCO applications on February 28, 1957. Petitioner Public Service Commission of the State of New York, which exercises general regulatory supervision over the gas industry in that state, intervened in the proceedings. An order of the respondent Commission permitted intervention also of four distributing company customers of Tennessee Gas, namely, Long Island Lighting Company, Public Service Electric and Gas Company, Brooklyn Union Gas Company, and Lake Shore Pipe

Line Company. Tennessee Gas was the only intervenor in favor of the CATCO applications.

In the latter part of March, 1957, the presiding examiner's decision ordered the issuance of certificates of public convenience and necessity to the CATCO applicants without conditions as to price, and conditioned only upon the issuance of a certificate to Tennessee Gas for the construction of its necessary facilities.

After exceptions were filed by intervenors, the respondent Commission issued its order of April 22, 1957. It directed the issuance of temporary certificates to the CATCO applicants, but remanded the proceedings to the examiner to determine what initial rates would accord with public convenience and necessity. After reviewing the circumstances which rendered this sale one of extreme importance both as to initial rate and as to the enormous volume of gas proposed to be sold, the Commission found:

> "Those factors make it abundantly evident that, in the public interest, this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest."

The CATCO applicants moved to modify that order, alleging that the economic risk involved would foreclose their acceptance of temporary certificates issued by the respondent Commission. Further, the applicants proposed to change their contracts so as to give the Commission continuing supervision of the proposed sale and future price increases regardless of any change Congress might make in the Natural Gas Act. The initial rate in the contract would stay at 22.4 cents per Mcf, however. No further evidence as to the reasonableness of the initial rate was presented.

The second order, issued May 20, 1957, demonstrated the Commission's desire to extend itself in an effort to be fair to the applicants while protecting the ultimate consumers from rates which might later be determined ex-

cessive. This order, however, still recognized that there was insufficient evidence in the record on which to base a finding that public convenience and necessity required sale of the gas at the initial rate proposed. The plan embodied in the Commission's order was intended to permit the sale of the gas as soon as possible and was to be effectuated in the following manner. Without remanding the proceedings to the examiner, permanent certificates would be issued conditioned upon the initial rate of 18 cents (including the one cent gathering tax reimbursement). The CATCO companies would be entitled to file for a rate increase to 22.4 cents per Mcf to be effective one day after the commencement of gas deliveries to Tennessee Gas.[1]

The Commission reasoned that the consumers would thereby not be relegated to the cumbersome and time-consuming procedure of a Section 5 proceeding where the burden would be on the Commission to show the rates unreasonable and where there are no provisions for refund in the event the Commission is able to meet its burden. The order, though unusual, was deemed necessary by the Commission to protect all parties concerned.

Still the CATCO applicants were not satisfied, and their dissatisfaction this time was expressed by Tennessee Gas in an application for rehearing filed June 4, 1957, which in part states:

> "Tennessee has been definitely advised by the producer-applicants that they will not amend Section 10 of the contract so as to change the initial rate from 21.4 cents per Mcf to 17 cents per Mcf. [The rates

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[1] Under Section 4 of the Natural Gas Act, the Commission is empowered to suspend rate increases up to a period of five months, but it waived this power by its promise to the applicants to limit suspension to a 24-hour period. The net result would have been to permit the sale almost immediately at the initial rate proposed in the contracts, allow the CATCO applicants the opportunity of proving by Section 4 proceedings that the rate was just and reasonable, and protect the consumers of Tennessee Gas from overpayment by means of the refund provisions of Section 4 in the event CATCO could not meet its burden.

exclude the tax.] Tennessee has been further informed by the producer-applicants that the certificates issued by said order will not be accepted by them for that reason, and that, accordingly, the contracts will be terminated. * * *"

A rehearing was held on June 12, 1957. No further evidence was added to the record. Counsel for the CATCO companies made it clear that unless CATCO received certificates not conditioned with initial rates they might deem objectionable, they would seek to dispose of their gas elsewhere than in the interstate market.

Impressed with this threat, the Commission issued its order of June 24, 1957, in which it granted permanent certificates of public convenience and necessity to the CATCO applicants without any condition affecting the initial price of 22.4 cents per Mcf as originally provided in the contracts with Tennessee Gas. Commissioner Connole dissented. It is this order which petitioners ask us to review.[2]

Tennessee Gas, CATCO, and the Commission argue that the petitioners have no standing to ask this court to review the order of June 24, 1957, because they are not "aggrieved" as required by Section 19(b) of the Act. Essentially, the petitioners represent the ultimate consumers of the gas. In Natural Gas Pipeline Company of America v. Federal Power Commission, 252 F.2d 3 (C.A.3, 1958), cert. pending, we held that a gas transmission company which has passed its increases on to its customers is "aggrieved," since as a matter of ethics and good business, it is required to protect its customers. Here the petitioners are more nearly representative of the ultimate consumers than was

[2] The petitioners pursuing their remedies in this court are Public Service Commission of the State of New York (No. 12,401), and Long Island Lighting Company and Public Service Electric and Gas Company (No. 12,403). Though these are separate petitions for review, we are disposing of both in one opinion. An order of this court issued October 22, 1957, permitted the CATCO companies and Tennessee Gas to intervene in support of the Commission's order under review.

Natural Gas Pipeline Company in that case. Furthermore, when it is considered that New York distributors are supplied by Tennessee Gas, that the contract price approved by the Commission's order is 4.4 cents higher than any other price paid by Tennessee Gas, that this is the first sale from new fields which will supply enormous quantities of gas in the future, and that the Commission's order in effect places the burden on the petitioners to show that the rates are unreasonable, it is clear the argument that petitioners are not "aggrieved" is without substance.

The suggestion that petitioners have not exhausted their administrative remedies is equally lacking in merit. The final order of the Commission granted unconditional certificates of public convenience and necessity. Rehearing has been denied. Judicial review is the next step, and the suggestion of unsatisfactory administrative remedies which are no remedies at all cannot displace this review.[3]

The petitioners pose substantially similar questions on the merits of the case, namely, whether the Commission committed error in its order of June 24 in dispensing with the consideration of the element of price because of the threat of the producers to withhold the gas from interstate commerce, after two previous determinations by the Commission that the sale should not be certificated without evidence in the record that the initial rate was just and reasonable. We conceive of the question, however, as a more fundamental one, involving the statutory jurisdiction of the Federal Power Commission. It is whether the Commission has authority to consider an application for a certificate under Section 7(e) where the terms of the application limit the scope of the inquiry which the Commission is required to make for a determination of public convenience and necessity.

The Commission is empowered by Section 7(e) of the Natural Gas Act to attach reasonable conditions to its

[3] Proceedings under Section 5 of the Act foreclose any possibility of refund to the petitioners of amounts which later may be determined to be excessive.

issuance of certificates of public convenience and necessity.[4] One of the conditions the Commission often attaches is the stipulation of the initial rate. The legislative history of Section 7(e) indicates clearly that Congress intended to give the Commission full scope in scrutinizing the rate structure proposed in passing on the issuance of the certificate. Signal Oil and Gas Co. v. Federal Power Commission, 238 F.2d 771, 774, note 3 (C.A.3, 1956), cert. denied, 353 U.S. 923 (1957). In the Signal Oil case, this court reaffirmed the statutory authority of the Commission to impose rate conditions where the public convenience and necessity required it. When the Signal Oil case was before the Commission, it said that the justness and reasonableness of the rate was a "vital element" in demonstrating "that the service proposed is or will be required by the present or future public convenience and necessity." Cities Service Gas Co., et al., 12 P.U.R. 3d 3, 14 (1955). According great weight to the initial rates proposed has been the policy of the Commission over the years as is indicated in its annual reports to Congress.[5]

While the Commission probably should always consider the impact of the proposed initial rate in its determination of public convenience and necessity, we do not reach the question of whether the Commission must fix the initial rate when its inquiry demonstrates that there is a substantial question of the reasonableness of that initial rate. See Oklahoma Natural Gas Co. v. Federal Power Commission, and the dissenting opinion of Judge Bazelon, D.C. Cir., 257 F. 2d 634, 642.

In the cases before us, the Commission has left no doubt of the importance and necessity of a consideration of the reasonableness of the proposed initial rate. In its first order issued April 22, 1957, the Commission said:

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[4] "* * * The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

[5] See dissent of Judge Bazelon in Oklahoma Natural Gas Co. v. Federal Power Commission, D.C. Cir., 257 F. 2d 642.

"The record contains insufficient evidence or testimony, however, on which to base a finding that the public convenience and necessity reqnires the sale of these volumes of gas at the particular rate level here proposed. The importance of this issue in certificating this sale cannot easily be overemphasized. This is the largest reserve ever committed to one sale. This is the first sale from the newly developed offshore fields from which large proportions of future gas supplies will be taken. This is the highest price level at which the sale of gas to Tennessee Gas has been proposed.

"Those factors make it abundantly evident that, in the public interest, this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest."

Again, in its order of May 20, 1957, the Commission said:

"* * * As we have already stated, the record does not contain sufficient evidence on which to base a finding that the public convenience and necessity requires the sale of the gas at that particular rate level. * * *"

It was only after the threat of withholding the gas from the interstate market that the Commission retreated from its previous position and granted the certificates without rate conditions by its order of June 24, 1957.[6] Commissioner Connole, in his dissent from this order, puts the problem into sharp focus:

"The record is plain that the controlling reason the parties refuse to submit their contracts to regulatory review in the manner found to be necessary in the public interest is their preference for a proceeding in

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[6] It is abundantly clear that the Commission changed its mind about the necessity of establishing that the proposed rate was in the public interest only because of the threat of the producers to withhold the gas from the interstate market unless they got certificates upon their own terms. The producers expressed themselves unequivocally through the application of Tennessee Gas for rehearing directed to the order of May 20, 1957, and further in oral argument at that rehearing.

which the burden would be on the Commission to establish that the rate was more than reasonable. They flatly refuse to submit to one in which the parties would be required to show only that the rate was required by the public convenience and necessity. No citation of authority or reference to regulatory theory is needed to demonstrate that the burden of showing the public convenience and necessity requires a proposed service at a particular price level is on the party seeking to take advantage of the proposed service and not on the tribunal before which the case is to be made. Under the unique conditions found here, the critical importance of that decision is indisputable."

The Commission defends its action by claiming the right to change its mind just as a court might do on rehearing, citing Cia Mexicana de Gas v. Federal Power Commission, 167 F.2d 804 (C.A.5, 1948). The petitioners, however, do not argue to the contrary. Their position is that, since in its first two orders the Commission determined that the record lacked sufficient evidence upon which to base a finding that the sale at the proposed rate would be in the public interest, and as the final order was based upon the same record, there is still insufficient evidence to support such a necessary finding.

The jurisdiction of the Federal Power Commission is entirely statutory. It acts as an arm of Congress, and only as Congress has directed it. It is empowered to grant certificates of public convenience and necessity by Section 7(e) of the Natural Gas Act.

"Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to per-

form the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. * * *"

The Act entrusts to the Commission, and to the Commission alone, the power and authority to determine the issue of public convenience and necessity. Within the framework of the Natural Gas Act, the Commission alone is entrusted with determining the scope of its inquiry necessary to arrive at the decision of whether to certificate a specific sale. It will be remembered that in its reports to Congress, the Commission has recognized that the element of price is important in determining whether a sale such as this should be approved, and as has been stated above, both the statute and the courts have recognized the authority of the Commission not only to take price into consideration but to condition a certificate for the sale of gas at a particular rate. In the present case, that the initial rate was a necessary consideration in the scope of inquiry into the determination of public convenience and necessity has been twice recognized by the Commission, even to the extent that its order of May 20, 1957, in fact conditioned the permanent certificates upon a contract amendment as to the initial price.

The Commission has jurisdiction to issue certificates under Section 7(e) based upon its independent judgment after an untrammelled consideration of all the elements which it deems necessary to arrive at that judgment. Congress has not given the Commission power to inquire into the issue of public convenience and necessity where, as here, the applicant circumscribes the scope of that inquiry by attaching a condition to its application requiring the Commission to forego the consideration of an element which

may be necessary in the formulation of its judgment. Otherwise stated, the Commission has not been endowed by Congress with jurisdiction to conduct a *limited* inquiry.

Congress has also made it clear that the applicant must be *willing* to perform the services proposed and conform to the provisions of the Act. The action of the applicants in curtailing the decision-making power of the Commission demonstrates their unwillingness to conform to the provisions of the Act; this in itself would require the denial of the applications. The Commission's function is to regulate the sale of gas by producers willing to sell under regulations arrived at in accordance with the provisions of the Act. Such regulations may not be the result of bargaining with an unwilling seller.

The order of the Federal Power Commission of June 24, 1957, will be vacated, and the proceedings will be remanded to the Commission with directions to proceed in conformity with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

Judgment

This cause came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of June 24, 1957 of the Federal Power Commission be, and it is hereby vacated, and the proceedings remanded to the Commission with directions to proceed in conformity with the opinion of this Court

Attest:

IDA O. CRESKOFF
Clerk

June 30, 1958

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Frederick Stueck, Acting Chairman; Seaborn L. Digby, William R. Connole and Arthur Kline.

In the Matters of

CONTINENTAL OIL COMPANY

Docket No. G-11024

THE ATLANTIC REFINING COMPANY

Docket No. G-11034

CITIES SERVICE PRODUCTION COMPANY

Docket No. G-11046

TIDEWATER OIL COMPANY

Docket No. G-11049

Order, Upon Application For Rehearing, Adopting Initial Decision of Presiding Examiner With Modifications and Conditions

(Issued June 24, 1957)

On June 4, 1957, Tennessee Gas Transmission Company (Tennessee Gas) filed an application for rehearing and reconsideration of the Commission's order issued in these proceedings on May 20, 1957. By order issued June 6, 1957, we granted rehearing and in such order provided for oral argument "upon the contentions made and issues presented by the application for rehearing, the motion for modification and the answers thereto heretofore filed in these proceedings."[1]

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[1] On May 6, 1957, Continental Oil Company; The Atlantic Refining Company, Cities Service Production Company and Tidewater Oil Company (collectively referred to as CATCO) filed a motion for modification of the Commission's order issued April 22, 1957, granting temporary certificates of

Pursuant to the ordr granting rehearing we heard oral argument on June 12, 1957.

The Commission's order issued May 20, 1957, modified an earlier order issued April 22, 1957, granting temporary certificates of public convenience and necessity to CATCO and to Tennessee Gas in Docket No. G-11107.

The temporary certificates issued by our order of April 22, 1957, authorized CATCO to sell natural gas to Tennessee Gas from CATCO's leases in the East Cameron, West Cameron and Vermilion areas off the coast of Louisiana in the Gulf of Me. ico, and authorized Tennessee Gas to construct and operate approximately 107 miles of pipeline from the off-shore platforms of CATCO to a point on its main system at Kinder, Louisiana.

The contracts for the sale of gas executed between each of the CATCO companies and Tennessee Gas which are exhibits in these proceedings provide for an initial price of 21.4 cents per Mcf[2] and for a definitely fixed price escalation of two cents per Mcf every four years.

As has been indicated hereinbefore, the CATCO companies filed a motion for modification of the Commission's order issued April 22, 1957. In the motion the CATCO companies indicated that they were unwilling to accept temporary certificates of public convenience and necessity under the conditions specified in the Commission's Order. They, however, proposed that the Commission issue permanent certificates permitting them to charge the initial agreed-upon price to 21.4 cents per Mcf,

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public convenience and necessity to CATCO and Tennessee Gas and directing that the proceedings "be remanded to the presiding examiner to determine at what rate the public convenience and necessity requires the sale of natural gas by CATCO to Tennessee Gas to be made if these CATCO companies are granted permanent certificates of public convenience and necessity." Answers to the motion were filed by New York Public Service Commission, Lake Shore Pipe Line Company, Brooklyn Union Gas Company and Long Island Lighting Company (jointly), and Public Service Electric and Gas Company (collectively referred to as Interveners) opposing the motion. Tennessee Gas filed an answer supporting the motion.

[2] Reimbursement for the one-cent Louisiana gathering tax would be added to this amount.

but agreed to modify therein respective contracts for the sale of natural gas to Tennessee Gas in such manner that the future price escalations contained in the contracts would remain subject to the Commission's scrutiny and jurisdiction in the event the Harris Bill, H.R. 6790, 85th Cong., were enacted into law. The proposed contract amendments would provide that if the Harris Bill were enacted, the price for gas would escalate up to the then current reasonable market price but not more than two cents per Mcf every four years.

In response to the motion we issued our May 20, 1957, order in which we granted permanent certificates of public convenience and necessity to the CATCO companies on condition that the contracts between the CATCO companies and Tennessee Gas be amended so as to provide for an initial price of 17 cents per Mcf, with provision for filing a request for an increase in such price to 21.4 cents per Mcf one day after the initial price became effective. Under the condition provision we also made for the incorporation in such contract of indefinite price escalations, with a ceiling increasing by two cents every four years.

In its application for rehearing filed June 4, 1957, Tennessee Gas has stated that it had been advised that the CATCO companies were unwilling to accept the permanent certificates of public convenience and necessity granted by the May 20, 1957, order because they objected to the pricing and other conditions specified in the order, and that they would terminate the contracts so that the large supply of gas contained in the off-shore reserves of the CATCO companies would not become available to the customers of Tennessee Gas. At the oral argument it became apparent that the CATCO companies objected to the 17-cent initial price set in the May 20, 1957, order. On the other hand, the CATCO companies indicated that they would still be willing to amend their contracts as proposed in their motion of May 6, 1957. They indicated further that if they failed to obtain certificates without price con-

ditions which they considered objectionable, they would seek to dispose of their gas elsewhere than to Tennessee Gas and the interstate market.

In the present status of the case we are left with the difficult problem of how to assure the delivery of this gas to the large market served by Tennessee Gas, and at the same time protect the consumers from an unreasonably high price. In reaching a solution to this problem we are moved by the primary consideration that the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas. Further, it appears to us, important as it the issue of price, that as far as the public is concerned, the precise charge that is made initially is less important than the assurance of this great supply of gas. In view of these circumstances and the fact that the record does not show that the 21.4- cent rate is necessarily excessive, we agree with the presiding examiner that this certificate proceeding under Section 7 of the Natural Gas Act should not assume the character of a rate proceeding under Section 5(a). We are of the opinion that, in the circumstances of this case, in view of the great demand for gas by customers of Tennessee Gas, the price consideration should not be made the prime determinant of what the public convenience and necessity require. By virtue of the authority conferred upon us by Sections 4 and 5 of the Natural Gas Act and the proposal to modify the contracts made by the CATCO companies, we are of the opinion that we will be able to adequately protect the public interest with respect to the matter of price. In order, therefore, to insure that deliveries of gas by the four CATCO companies to Tennessee Gas will commence as promptly as possible, we will grant permanent certificates to them by this order without any condition affecting the initial price of 21.4 cents per Mcf.

However, because the 21.4-cent price, as we have heretofore observed, is higher than Tennessee Gas is paying under any other contract, it should be subject to prompt

investigation under Section 5 (a) as to its reasonableness. In this connection, we may note that when three of the CATCO companies, Continental Oil, Atlantic Refining and Tidewater Oil file their contracts with Tennessee Gas as rate schedules as required by the Natural Gas Act and our Regulations, such contracts will be subject to rate investigations now outstanding against these companies. Thus, by our order issued January 27, 1956, in Docket Nos. G-9283 and G-9284, we instituted an investigation of any of the rates or charges of Atlantic Refining and Tidewater Oil with respect to any transportation or sale of natural gas subject to our jurisdiction, and by our order issued the same day in Docket No. G-9279, we instituted a similar investigation of the rates and charges of Continental Oil. Concurrently with this order we are instituting in Docket No. G-12780 an investigation of the rates and charges of Cities Service. By this means relief can be afforded to the consuming public if it should be found that the 21.4-cent initial rate to be charged for the offshore gas is excessive.

It appears to be true that if the Harris Bill, H.R. 6790, 85th Congress, or some bill similar to it, becomes law that we may lose continuing supervision over the future increased prices provided in the several contracts between the CATCO companies and Tennessee Gas. Therefore, we shall adopt the proposal of the companies made in their motion for modification of May 6, 1957, that they amend their contracts so that the price increases will remain subject to our control by using "indefinite pricing clauses" rather than "definite pricing clauses" within the meaning of the Harris Bill. They propose to do this, as indicated above, by providing that the initial sales price shall be 21.4 cents per Mcf until November 1, 1962, as at present, but after that the "reasonable market price" within the meaning of the bill and as determined by this Commission shall prevail. Adjustments would be initiated by the sellers at four-year intervals but would be limited by the

step increases now provided in the contracts. The CATCO companies state that Tennessee Gas is agreeable to this arrangement and will enter into such an amendment with each of the CATCO companies.

The Commission finds:

(1) It is necessary and appropriate in the public interest to adopt the initial decision of the presiding examiner with modifications and conditions and to modify the Commission's order issued May 20, 1957, in the above-entitled proceedings, in the manner set forth below.

(2) The CATCO companies are able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Natural Gas Act, and the requirements, rules, and regulations of the Commission thereunder.

(3) The sales of natural gas by the CATCO companies to Tennessee Gas, as referred to above, together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, are required by the public convenience and necessity, and permanent certificates therefor should be issued as hereinafter ordered and conditioned.

The Commission orders:

(A) Permanent certificates of public convenience and necessity are hereby issued to the CATCO companies, without further hearing, authorizing the sale of natural gas to Tennessee Gas, from CATCO's leases in the East Cameron, West Cameron and Vermilion areas off the coast of Louisiana in the Gulf of Mexico, together with the construction and operation of any facilities, subject to the jurisdiction of the Commission, used for such sale, as hereinbefore described and as more fully described in the application in this proceeding.

(B) Each of the CATCO companies, within 20 days after the issuance of this order, shall file with the Commission

a duly executed amendment to the contract submitted as an exhibit to its certificate application providing for sale of natural gas to Tennessee Gas embodying the following language:

> If and in the event that H. R. 6790 or any substantially similar legislation is enacted into law by the 85th Congress, and becomes effective, then the provisions of Section 10, *Prices,* commencing with the portion thereof reading
> "From the date of initial delivery or November 1, 1957. whichever occurs first,
> until November 1, 1962.....21.4 Cents per MCF"
> to and including that portion thereof reading
> "From November 1, 1986 to expiration
> of this contract.....35.4 Cents per MCF"
> is hereby deleted, and the following is substituted in lieu thereof:
> From the date of initial delivery or
> November 1, 1957, whichever occurs first,
> and thereafter.....21.4 Cents per MCF
> Provided that, After November 1, 1962, Seller shall be entitled to receive and Buyer shall pay the reasonable market price, if higher than 21.4 cents per Mcf, for the gas at the points of delivery within the limitations and subject to the terms and conditions as hereinafter set forth. Such reasonable market price shall be that as fixed by the Federal Power Commission under applicable law, after initial determination thereof by Seller as herein provided. If Seller should determine that the reasonable market price for the gas at the points of delivery for any of the 4-year periods hereinafter listed would be in excess of the price then being paid hereunder, Seller may notify Buyer, not less than eight months prior to the commencement of such period, of the price to be paid by Buyer hereunder during such period and until a subsequent determination by Seller

in accordance herewith is made effective. Any price so determined and fixed shall be not less than 21.4¢ per Mcf and not more than:

23.4 Cents per MCF	From November 1, 1962 to November 1, 1966
25.4 Cents per MCF	From November 1, 1966 to November 1, 1970
27.4 Cents per MCF	From November 1, 1970 to November 1, 1974
29.4 Cents per MCF	From November 1, 1974 to November 1, 1978;

and in the event the term of this contract is extended hereunder beyond November 1, 1978, then not more than

31.4 Cents per MCF	From November 1, 1978 to November 1, 1982
33.4 Cents per MCF	From November 1, 1982 to November 1, 1986
35.4 Cents per MCF	From November 1, 1986 to the expiration of this contract.

Except as altered hereinabove, the provisions of Section 10, *Prices*, shall remain unaffected and in full force and effect.

(C) The certificates issued herein shall be accepted in writing and under oath by each of the CATCO parties, each of whom shall be authorized to commence service upon acceptance and upon completion of construction of the "offshore facilities" by Tennessee Gas. Each acceptance shall be accompanied by a resolution of the Board of Directors of the accepting company duly authenticated indicating the approval of the acceptance of the certificates hereby granted.

(D) The certificates issued herein are not transferable and shall be effective only so long as each CATCO company continues the acts or operations hereby authorized in ac-

cordance with the provisions of the Natural Gas Act, and the applicable rules, regulations and orders of the Commission.

(E) The grant of the certificates herein shall not be construed as a waiver of the requirements of Section 4 of the Natural Gas Act, or of Part 154 of the Commission's Rules and Regulations thereunder requiring the filing of rate schedules for the services herein authorized; and is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against the CATCO companies. Further, our action in this proceeding shall not foreclose nor prejudice any future proceedings or objection relating to the operation of any price or related provision in the gas purchase contracts herein involved.

(F) The findings of fact and the conclusions of the presiding examiner are hereby adopted except where inconsistent with this order.

(G) Our order issued May 20, 1957, is hereby modified to the extent that it is inconsistent with this order.

By the Commission. Commissioner Connole dissenting.

JOSEPH H. GUTRIDE,
Secretary.

In the Matters of

CONTINENTAL OIL COMPANY, ET AL.

Docket No. G-11,024, *et al.*

(Issued June 24, 1957)

CONNOLE, Commissioner, *dissenting:*

The manifest unwillingness of the producers here involved to submit to properly constituted public authority the prices at which they propose to make these significant

sales in interstate commerce has precipitated a crisis for consumers and Commission far out of proportion to the importance of the immediate proceeding. The depth of the crisis was well expressed at the oral argument of June 12, 1957. Producers represented that unless we abandoned our position in this matter it would be their decision to withdraw this gas from the interstate market. Representatives of consuming interests and of metropolitan distributing companies contended it would be preferable to risk curtailment of expansion and, by necessary implication, certainty of supply rather than to permit the Commission to depart from the position taken in our prior Orders in this docket.

This proceeding is another example of the manner in which the skyrocketing demand for natural gas is severely straining the industry's price structure. Demand threatens to elevate price levels beyond customer tolerance. As a result each proposed sale at new high price levels must be evaluated with particular care. Avoiding the disastrous consequences of a collision between consumers' needs for additional gas and producers' demands for additional compensation is particularly difficult in this proceeding because producers have presented the Commission with an almost classic Hobson's choice. In addition, the issues have become expanded in scope and effect until far more than the initial price level of this particular sale is involved. As I see it, the validity of the Commission's judicially approved right to attach a rate condition to certificates of public convenience and necessity when it is called for, and in fact, the very inviolability of all Commission orders is at issue here.

It is clear from the history of this proceeding that we have made unprecedented efforts to ensure fair treatment, that we have clearly evidenced our intention to cooperate in arriving at an initial price level that would be just and reasonable to all parties affected. Despite these efforts, however, the producers remain adamant. Despite ample administrative and judicial authority to the

contrary[1] they insist that a proposal to make a sale of natural gas in interstate commerce is not subject to regulatory review to determine if the public interest requires that it be made at the prices proposed.

The record is plain that the controlling reason the parties refuse to submit their contracts to regulatory review in the manner found to be necessary in the public interest is their preference for a proceeding in which the burden would be on the Commission to establish that the rate was more than reasonable. They flatly refuse to submit to one in which the parties would be required to show only that the rate was required by the public convenience and necessity. No citation of authority or reference to regulatory theory is needed to demonstrate that the burden of showing the public convenience and necessity requires a proposed service at a particular price level is on the party seeking to take advantage of the proposed service and not on the tribunal before which the case is to be made. Under the unique conditions found here, the critical importance of that decision is indisputable.

So much has been said in other forums, so many and so unanimous are the authorities in support of it, that to argue that validity and equity of the procedure contemplated by our prior Orders and supported by the *Signal Oil* case, *supra*, would serve no useful purpose now. At this tardy date the unbeliever needs inspiration, not persuasion, if the veil of obstinacy is to be removed from his eyes.

Of more immediate consequence, however, is the dilemma into which the refusal has placed this Commission and the consumers whose interest we must protect. Denial of essential supplies on the one hand, and on the other, inadequate protection against unjust and unreasonable rates.

It contributes nothing to argue that the issue here is sanctity of contract. When it applies, no one feels the

[1] See *Cities Service Gas Co., Signal Oil and Gas Co.*, 14 F.P.C. —, Opinion No. 288, Nos. G-2569, G-2570, November 28, 1955, affirmed as *Signal Oil and Gas Co.* v. *F.P.C.*, 238 F. 2d 771 (CA3), *certiorari* denied 353 U.S. 923.

force of that argument more keenly than I. And when it was threatened, I spoke out against it. For example, see my separate statement *In the Matters of American Louisiana Pipe Line Company, et al.*, G-10396, *et al.*, issued January 11, 1957.

But no contract terms are involved here. No party questions the manner in which the other has carried out its part of a bargain. If anything, an essential party to the contracts has been crowded out of the bargaining table. And rather than to permit the public interest a place, the bargainers would turn the table upside down and walk away from the entire proceeding.

Plain facts are that the gas has been placed on the interstate market on one set of terms and one only. This Commission and the consumers who have made irrecoverable investments in order to use it, are given no choice but to accept. The arbitrary nature of this position appears from an examination of the orders which have been rejected by the producers.

No voice has been raised to dispute the facts that were set out so clearly in our Order of April 22, 1957. To my legal understanding they are still facts. A few sentences will illustrate (pg. 2, mimeo):

> "The record contains insufficient evidence or testimony however, on which to base a finding that public convenience and necessity requires the sale of these volumes of gas at the particular rate level here proposed. The importance of this issue in certificating this sale cannot easily be overemphasized. This is the largest reserve ever committed to one sale. This is the first sale from the newly developed offshore fields from which large proportions of future gas supplies will be taken. This is the highest price level at which the sale of gas to Tennessee Gas has been proposed.
>
> "These factors make it abundantly evident that, in the public interest, this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest. . . ."

No effective objection has been made to our Order of May 20, 1957. The upper limit of the price range used by the Commission in that Order was set by the contracts themselves which the record discloses contain the highest of at least four bid prices. The lower limit was urged by disinterested public authority intervenors and supported by evidence of record showing, among other things, that it was the highest price presently being paid by Tennessee Gas for the purchase of any gas produced in the Southwest area. Effectively, the Order provided a floor which the rates would not penetrate, an assurance notably lacking in the Section 5(a) procedure so zealously embraced by the applicants. And still the refusal persists.

Nothing but threats by the producers supports the proposition that this gas would be barred forever from the interstate market. And the very quantity of offshore gas affected by this decision makes it clear that the only practical market for gas of this kind for years to come is to the large consuming areas served by the long haul interstate pipelines. In my judgment the pricing pattern should not be set for so crucial a supply source in an atmosphere charged with urgency and in response to arguments whose primary motivation is private, not public, gain. The election by the producers to reject their public responsibility and insist on exercising the full strength of their bargaining position has altered completely the impact of logical and equitable arguments.

The decision of the majority is justifiable only by the evil consequences of the loss of these reserves to the particular pipeline which is a party to the contracts. Such evils would, in the opinion of the majority, exceed the gain to follow from the proof that the public convenience and necessity does not require the sale of this gas at proposed rates.

In my opinion, the consequences of abandoning our position will be more serious than their effect on this particular sale. Whether by design or accident, the issues in this

proceeding now transcend the close limits of the original hearing. At stake is the question whether the Commission should hold a position which it has determined is in the long run public interest, or whether it should abandon it when confronted with allegations that short run injury to one segment of the industry and consumers might result. Where the issue is reduced to this simple statement, the answer is clear.

Majority quite properly are concerned that persisting in either our April 22 or our May 20 Order will result in cancellation of the CATCO-Tennessee contracts. I agree it probably would. And quite understandably the majority refuses to permit a few distributing companies and one Public Service Commission to dictate the interests of all other consumers on Tennessee's lines. Unfortunately, however, there is more to this issue.

As concerned as I am for Tennessee's customers, I am more concerned for the whole body of consumers on *all* transmission pipe lines for whose protection we are responsible. And as deserving of preservation as I believe those particular Orders to be, I believe the principle that Federal regulatory Orders should not be changed by threats of abandoning public responsibility is even more important.

On balance, and in view of the expansion of the issues beyond those originally contemplated by this docket, I believe it more important to the public interest to preserve the Commission's authority to make lawful and necessary orders than it is to preserve these contracts as written. The right to maintain valid orders against allegations of urgency, the importance to the consumer of the *Signal Oil* doctrine, and the right of *all* consumers for protection against unreasonable initial rates outweight the potential damage to the consumers of Tennessee Gas Transmission which might flow from maintaining the position I urge here.

While dissenting may appear to serve no useful purpose, the damage to consumer and to the public interest, to the regulatory process, and to the future of the interstate natural gas business as it is given me to discern it, would be such under the majority decision that, inevitable as that decision may appear to be, I am left no choice but to protest it by filing a dissenting vote.

I dissent from the action of the majority in this cause.

WILLIAM R. CONNOLE, *Commissioner*

APPENDIX C

The pertinent provisions of the Natural Gas Act of June 21, 1938, c. 556, 52 Stat. 821; as amended by Act of February 7, 1942, c. 49, 56 Stat. 83; 15 U.S.C. 717-717w, are as follows:

Sec. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such

rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and publised.

(e) Whenever any such new schedule is filed the Commision shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the pro-

ceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U.S.C. § 717c]

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Sec. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract

to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * * * * * * *

Sec. 7. (c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bonafide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f (c)]

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require. [56 Stat. 84 (1942); 15 U.S.C. § 717f (d)]

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise, such

application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f(e)]

• • • • • • • • • •

Sec. 19. (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall

certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

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NOV 24
JAMES R. BROWNING

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 536

TENNESSEE GAS TRANSMISSION COMPANY, *Petitioner*,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, LONG ISLAND LIGHTING COMPANY, AND PUBLIC SERVICE ELECTRIC AND GAS COMPANY, *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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November 24, 1958

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No.

TENNESSEE GAS TRANSMISSION COMPANY, *Petitioner,*

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, LONG ISLAND LIGHTING COMPANY, AND PUBLIC SERVICE ELECTRIC AND GAS COMPANY, *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Tennessee Gas Transmission Company (Tennessee), an intervenor below, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this cause on June 30, 1958.

OPINION BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 257 F. 2d 717 (App. A, *infra,*

pp. 1-11). The opinion of the Federal Power Commission (App. B, *infra*, pp. 13-27) is reported at 17 F.P.C. 880.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1958 (App. A, *infra*, p. 12). By order of August 27, 1958, the Court of Appeals denied timely petitions for rehearing filed by Tennessee and other parties (App. A, *infra*, p. 12). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) (1948) and Section 19(b) of the Natural Gas Act, 52 Stat. 831 (1938), 15 U.S.C. 717r(b).

QUESTIONS PRESENTED

1. Whether the Federal Power Commission lacks jurisdiction to issue a certificate of public convenience and necessity to an independent producer of natural gas, where such producer indicates an unwillingness to accept a certificate conditioned on a lower initial price than agreed to by contract.

2. Whether the Commission must, in an independent producer certificate case, determine the justness and reasonableness of the initial price when a question is raised as to the propriety of such initial price, or whether it can defer such matter for determination in a full rate investigation under section 5(a) of the Natural Gas Act.

3. Whether an objection or ground not urged before the Commission on rehearing nor before the Court of Appeals in the review proceeding, can form the basis for the decision of the Court of Appeals.

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821 (1938), as amended by 56 Stat. 83 (1942), 15 U.S.C., §§ 717-717w are set forth in Appendix C, *infra*, pp. 28-32.

STATEMENT

This petition stems from the judgment of the Court of Appeals for the Third Circuit (App. A, *infra*, p. 12) on review of an order (App. B, *infra*, pp. 13-27) of the Federal Power Commission (Commission) authorizing four independent producers of natural gas to sell gas from certain wells located in the Gulf of Mexico to Tennessee. The Court of Appeals vacated the Commission's order and remanded the proceedings to the Commission (257 F. 2d 717, 723; App. A, *infra*, p. 12).

Tennessee is a natural-gas company subject to the jurisdiction of the Commission. It operates a pipeline system extending from gas fields in Texas and Louisiana through Arkansas, Mississippi, Tennessee, Kentucky, West Virginia, Ohio, Pennsylvania, New Jersey, New York, and into Massachusetts, New Hampshire, Rhode Island and Connecticut. Along this route, it serves over 80 distributing companies, which in turn serve many millions of ultimate consumers.

To meet the constantly increasing demand for gas in this vast market, Tennessee is continuously searching for the best possible gas supplies at the lowest possible prices.[1]. To this end, Tennessee, in August, 1956, en-

[1] In Tennessee's recent application in Docket G-11107, it sought authority to increase substantially its system capacity in order to meet the increased requirements of its customers totalling over 300,000 Mcf per day (17 F.P.C. 461, 469).

tered into identical 20-year gas purchase contracts with four producers of natural gas, collectively referred to as CATCO[2] (R. 24a-25a, 40a-41a, 286a-328a).[3] These producers each own an undivided 25 per cent interest in leases located a substantial distance off the coast of Louisiana in the Gulf of Mexico (R. 23a-24a, 280a). From those leases, up to two trillion cubic feet of gas is dedicated to the performance of the contracts and an additional trillion cubic feet of gas can also be dedicated under the contracts (R. 236a, 294a-296a).

The Commission Proceedings

The CATCO producers filed applications with the Commission for certificates of public convenience and necessity authorizing the sales to Tennessee pursuant to the aforementioned contracts. The Commission consolidated the applications for hearing. By order issued February 27, 1957, Tennessee was permitted to intervene in the consolidated proceeding (R. 330a). By the same order, four customers of Tennessee were permitted to intervene, two of which are respondents herein (R. 330a). The Public Service Commission of the State of New York (New York Commission), the other respondent herein, intervened in the Commis-

[2] Cities Service Production Company, Atlantic Refining Company, Tidewater Oil Company and Continental Oil Company. None of these companies own any interest in Tennessee or in each other. Tennessee does not own any interest in any of these companies (R. 24a).

The record references set forth herein are to the certified copy of the record filed by the above named companies with their Petition For A Writ Of Certiorari in case number 518. The abbreviation "R." refers to the page of the joint appendix.

[3] Since the contracts with the four producers are identical, only one of the contracts was designated for printing in the joint appendix.

sion proceeding by the filing of a Notice of Intervention (R. 329a).

The major concern of these intervenors before the Commission was the initial price of 21.4 cents[4] per Mcf which Tennessee had agreed to pay for this gas. This price was the result of arm's-length negotiations extending over a period of some ten months (R. 24a, 43a). Tennessee acknowledged that this was a higher price than it was paying under any of its other previously-executed contracts.[5]

However, the immensity of the reserves dedicated to the contracts makes it unique when compared with Tennessee's other gas purchase contracts. Indeed, as far as is known, it is the largest block of gas ever sold in one transaction on the Gulf Coast (R. 41a-42a, 251a). The CATCO reserve constitutes from 11 to 12 per cent of the total reserves available to Tennessee (R. 139a-140a) and is located in a new gas producing area where neither Tennessee nor any other pipeline company has gas purchase contracts (R. 43a-44a).

This vast reserve is well located in relation to Tennessee's system, thereby affording Tennessee an entry

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[4] Plus 1 cent for the Louisiana gathering tax. The intervenors were also concerned with escalation provisions in the contracts which required at every four-year interval after November 1, 1962, an automatic increase in price of 2 cents per Mcf (R. 310a). This concern was alleviated by the producers, however, by their later agreement to modify these provisions so that the Commission would retain jurisdiction over the increases in the event the Harris Bill (H.R. 6790, 85th Congress), or substantially similar legislation was enacted into law (App. B, *infra*, pp. 17-18).

[5] Assuming the purchase of 240,000 Mcf of gas per day under the instant contracts during the entire year 1958, Tennessee's weighted average cost of gas would be increased by only 0.97 cents per Mcf (R. 45a).

into the vast areas of gas reserves situated off-shore from the State of Louisiana (R. 41a, 250a-251a). To attach the reserves Tennessee had to construct only 46.4 miles of pipeline (R. 45a-46a). This is to be contrasted with over 500 miles of pipeline which Tennessee had to build in order to bring certain Texas gas into its system. Further indication of the value of these reserves in relation to location is shown by the fact that El Paso Natural Gas Company, which was also negotiating for these same reserves, would have had to build 600 miles of pipeline to bring the gas involved into its system (R. 250a-251a). Among other pipe line companies attempting to purchase these reserves were Southern Natural Gas Company, United Fuel Gas Company and American Louisiana Pipe Line Company (R. 42a).

While the Respondents herein attacked the initial price of 21.4 cents per Mcf as being too high, no evidence in support of their contention was offered. They nevertheless urged that the certificates be conditioned on a lower price, although, as shown below, they did not agree on what that price should be (R. 378a-379a, 389a-390a).

On March 29, 1957, the Presiding Examiner issued his Decision (R. 335a-359a) wherein he recommended a grant of the producer certificates applied for, but declined to impose a condition requiring a reduction in the initial price of 21.4 cents. In exceptions filed to that decision, the New York Commission requested the imposition of a condition requiring an initial price of 15.4 cents per Mcf, exclusve of tax (R. 389a); Lake Shore Pipe Line Company (not a party herein) requested a 17-cent initial price; Public Service Electric and Gas Company (Public Service) requested the

imposition of a price condition "which would require that the proposed sales be made at such lower price which would protect the interest of the consumers" (R. 394a); and Long Island Lighting Company (Long Island) requested that if the 21.4-cent initial rate were permitted to stand, the rate be made the subject of rate investigations under Section 5(a) of the Natural Gas Act[6] (R. 379a).

On April 22, 1957, the Commission, upon review of the Examiner's Decision, issued an order (17 F.P.C. 574) granting temporary certificates to the producer-applicants,[7] but remanded the matter to the Presiding Examiner "to determine at what rates the public convenience and necessity requires these sales to be made if permanent certificates are to be granted to these companies upon final disposition of their applications" (17 F.P.C. 574, 576).[8]

A motion for modification of the April 22, 1957 order was filed by the producer-applicants on May 6, 1957 (R. 396a-404a), in which they pointed out that the economic risk to which they would be exposed precluded their acceptance of the temporary certificates. Accordingly, they requested the issuance of permanent certificates without condition as to initial price. They did offer, however, to amend the price escalation pro-

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[6] This is precisely what was done by the Commission in its Order (App. B, *infra*, pp. 13-27).

[7] By the same order, a temporary certificate was issued to Tennessee authorizing the construction of the facilities necessary to bring the gas into its system. Such facilities have been constructed.

[8] The Commission there concluded that there was insufficient evidence on which to base a finding that the public convenience and necessity required the sales at the particular price proposed (17 F.P.C. 574, 575).

visions of the contracts so as to assure Commission jurisdiction over such prices in the event the Harris Bill (H.R. 6790, 85th Congress) was enacted into law (R. 401a-403a).

On May 20, 1957, the Commission issued an order in which it granted permanent certificates to the producer-applicants as requested in their motion for modification. By the same order, however, it conditioned the certificates by requiring an amendment of the gas purchase contracts so as to provide for an initial price of 17 cents per Mcf (exclusive of the one-cent gathering tax) with the right of the producers to file for an increase in rates (not to exceed 21.4 cents per Mcf) to be effective one day after commencement of deliveries to Tennessee (17 F.P.C. 732). The price of 17 cents was selected by the Commission simply because it was the highest price then being paid by Tennessee for gas purchased in the southwestern part of the United States (17 F.P.C. 732, 734).

On June 4, 1957, Tennessee filed an Application for Rehearing of the May 20, 1957 order (R. 416a-423a). In its Application for Rehearing, Tennessee stated (R. 418a):

> "Tennessee has been definitely advised by the producer-applicants that they will not amend Section 10 of the contract so as to change the initial rate from 21.4 cents per Mcf to 17 cents per Mcf. Tennessee has been further informed by the producer-applicants that the certificates issued by said order will not be accepted by them for that reason, and that, accordingly, the contracts will be terminated. It is clear, therefore, that Tennessee now faces the stark reality of contract termination; and its customers face the grim reality of suffering the loss of natural-gas supplies

> which are required to insure adequate and continuous long-term service and to meet the expanding needs of the consumers. The consequences of the loss of these valuable gas reserves are so far-reaching and the impact thereof on the economy of the areas involved is so great, at to stagger the imagination. * * *"

Oral argument was held before the entire Commission, and on June 24, 1957 the order here involved was issued by the Commission (App. B, *infra*, pp. 13-27).[9] Upon further evaluation of the record, the Commission found that "the record does not show that the 21.4 cent price is excessive." It concluded that in the light of the circumstances involved, and in view of the fact that it could protect the public "with respect to the matter of price" through the rate investigation provisions of the Act, the "precise charge that is made initially is less important than the assurance of this great gas supply." The Commission, therefore, reversed its previous determination and issued certificates without any condition affecting the initial price. While the order permitted the initial rate to remain at 21.4 cents, it made the rate subject to investigation as to the justness and reasonableness

[9] At the oral argument it was demonstrated that in a number of cases the Commission had authorized sales along the Louisiana Gulf Coast at an initial price of 20 cents or more. (See also R. 248a-249a). For example, see *Houston, Texas Gas & Oil et al*, 16 F.P.C. 118, 125, where initial price was "21.0 cents per Mcf for the first two years after initial delivery and 22.5 cents per Mcf after the first two years." Affirmed on appeal, where intervenors raised similar price issue to that in the instant case, *sub nom., Florida Economic Advisory Council* v. *F.P.C.*, 251 F. 2d 643, 646 (D.C. Cir. 1957); *cert. den.*, 78 S. Ct. 996.

thereof in Section 5(a) proceedings instituted against all four of the producer-applicants.[10]

In the same order, the Commission required the contracts to be amended "so that the price increases will remain subject to our control by using 'indefinite pricing clauses' rather than 'definite pricing clauses' within the meaning of the Harris Bill [H.R. 6790, 85th Congress]."

The respondents filed petitions for review which were predicated, in essence, on the contention that the Commission abused its discretion in not conditioning the certificate on a lower price. The Court of Appeals, in vacating the Commission's order, stated, *inter alia:*

> "* * *. We conceive of the question, however, as a more fundamental one, involving the statutory jurisdiction of the Federal Power Commission. It is whether the Commission has authority to consider an application for a certificate under Section 7(e) where the terms of the application limit the scope of the inquiry which the Commission is required to make for a determination of public convenience and necessity." (App. A, *infra*, p. 7).
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> "It was only after the threat of withholding the gas from the interstate market that the Commission retreated from its previous position and granted the certificates without rate conditions by its order of June 24, 1957. * * *" (App. A, *infra*, p. 8).
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[10] Section 5(a) rate investigations had already been instituted against three of the producers. Accordingly, concurrently with the issuance of the June 24, 1957 order, the Commission instituted a Section 5(a) investigation against the fourth producer, Cities Service Production Company (App. B, *infra*, pp. 13-27). Those investigations are now in progress.

"The Commission has jurisdiction to issue certificates under Section 7(e) based upon its independent judgment after an untrammelled consideration of all the elements which it deems necessary to arrive at that judgment. Congress has not given the Commission power to inquire into the issue of public convenience and necessity where, as here, the applicant circumscribes the scope of that inquiry by attaching a condition to its application requiring the Commission to forego the consideration of an element which may be necessary in the formulation of its judgment. Otherwise stated, the Commission has not been endowed by Congress with jurisdiction to conduct a limited *inquiry*.

"Congress has also made it clear that the applicant must be *willing* to perform the services proposed and conform to the provision of the Act. The action of the applicants in curtailing the decision-making power of the Commission demonstrates their unwillingness to conform to the provisions of the Act; this in itself would require the denial of the applications. The Commission's function is to regulate the sale of gas by producers willing to sell under regulations arrived at in accordance with the provisions of the Act. Such regulations may not be the result of bargaining with an unwilling seller." (App. A, *infra*, p. 11).

REASONS FOR GRANTING THE WRIT

In holding, in effect, that an applicant who indicates an unwillingness to accept a certificate containing a particular type of price condition, thereby ousts the Commission from jurisdiction to consider favorably the application involved, the court below has grossly misconstrued and misapplied the Natural Gas Act. We believe that the decision of the court below, if permitted to stand, will seriously impair the ability of the Federal Power Commission properly to dis-

charge its statutory duties and functions, and will ultimately redound to the deteriment of the gas consuming public.

The basic issue before the court below was whether the Commission abused its discretion in declining to condition the certificate on a lower initial price. The court below, instead of considering that issue, reversed the Commission on the jurisdictional ground set forth above, which ground was neither urged before the Commission in an application for rehearing, nor before the court in briefs or oral argument.

But the greater mischief and error of the decision of the court below lies in its holding that the Commission lacked statutory jurisdiction to issue the certificates involved because of the unwillingness of the producer-applicants to accept a lower initial price for their gas than had been agreed to by contract.

1. Importance

As the court is aware, the natural gas industry has been, and continues to be, a rapidly expanding industry. The demands for natural gas for space-heating and for industrial purposes continues to grow at a rapid rate. To satisfy that demand, pipeline companies are constantly seeking certificate authority from the Commission to build new pipelines or expand their present systems. Invariably, however, a requested certificate will not be issued by the Commission unless the applicant pipeline company is able to show adequate gas reserves under its control, by ownership or contract, to support its project. We know of no large interstate pipeline company which owns all the gas reserves necessary to meet the requirements of its customers. Those requirements are met, for the most

part, by gas purchased from various independent producers, such as the CATCO companies, pursuant to arm's-length negotiated contracts. However, before the sale by the independent producer can be made to the pipeline company, a certificate of public convenience and necessity must be secured by the producer from the Commission. It is that type of producer certificate proceeding which is involved in this case.

Because the producer applicants stated their unwillingness to commit their gas to the interstate market at a lower *initial* price than that agreed upon by contract, the court below was of the view that the Commission lacked jurisdiction to issue certificates to them. Such stated unwillingness on the part of the producers, in the view of the court below, circumscribed the scope of the Commission's inquiry "by attaching a condition to its application requiring the Commission to forego the consideration of an element [the initial price] which may be necessary in the formulation of its judgment." The Commission, stated the court below, "has not been endowed by Congress with jurisdiction to conduct a *limited* inquiry" (App. A, *infra*, p. 11).

It is apparent, however, from the Commission's order (App. B, *infra*, pp. 13-27), that the Commission did consider the element of price. It weighed the matter of price alongside the undisputed need for gas in the interstate market. It balanced the interests of all concerned and arrived at its informed judgment that the public convenience and necessity would be better served by removing the price condition which it had previously felt should be included in the certificates. To be sure, the Commission made no findings as to the justness and reasonableness of the initial

price. But a certificate proceeding is not the type of proceeding wherein it is feasible to inquire into the justness and reasonableness of price. So long as the Commission has full control over price, as it has here by virtue of the Section 5(a) investigations which it instituted, due and timely execution of its functions require that certificate proceedings not be delayed pending full inquiry into rate matters.

By this practice, the Commission eliminates the risk of losing or delaying the acquisition of valuable gas reserves for the interstate market. If, at the conclusion of the Section 5(a) investigation, the Commission finds the price to be unreasonably high, reductions therein can be ordered. It is true that there is a risk that the consumer, during the interim, may pay a higher price than is ultimately found reasonable. But it is for the Commission to decide whether such risk outweighs the practical necessity of securing, at the earliest opportunity, the gas for the interstate market. The court below, we submit, should not have substituted its judgment for that of the Commission. *Charleston & Western Carolina Ry. Co.* v. *Federal Power Commission*, 234 F. 2d 62, 64 (D.C. Cir., 1956).

The fact that the applicants stated an unwillingness to commit their gas to the interstate market at a lower *initial* price than that agreed upon by contract, did not, and could not, circumscribe the scope of the Commission's inquiry. An applicant for a certificate has no obligation to accept a certificate from the Commission containing conditions which the applicant considers unreasonable or otherwise unacceptable. He does not subject himself to the jurisdiction of the Commission by the mere act of filing an application for a certificate. He only

subjects himself to the jurisdiction of the Commission if he accepts the certificate and puts his gas in the interstate market. Cf., *Central West Utility Company* v. *Federal Power Commission*, 247 F. 2d 306 (3rd Cir. 1956).

Every applicant for a certificate is, in essence, requesting a certificate exactly as set forth in his application. Implicit in every application is the understanding that unless the certificate issued is acceptable to the applicant, he will refuse it. It cannot be assumed, however, as the court below apparently did, that implicit in the filing of an application is a legal requirement that the applicant be willing to accept any certificate issued by the Commission, regardless of the conditions imposed therein. Indeed, the Commission's rules specifically provide that any certificate issued by it "shall be void and without force or effect unless accepted in writing by applicant within 30 days from the issue date of the order issuing such certificate" (18 C.F.R. 157.20).

2. Commission Discretion

In the instant case, the Commission was confronted with a very practical problem, namely, the need for additional gas for the interstate market—particularly an amount as large as that involved herein (App. B, *infra*, p. 16). It was, of course, disturbed by the fact that the 21.4-cent price was higher than the price being paid by Tennessee under other gas purchase contracts. Faced with the fact that gas would be lost to the interstate market, the Commission, in its informed discretion, decided to permit the CATCO companies to charge the 21.4-cent price until such time as it could determine,

in a full-fledged rate investigation, whether or not that price was too high.[11] As noted above, the 21.4-cent rate was made the subject of Section 5(a) investigations, and such investigations are now in progress.

In many pipeline, as well as producer, certificate cases, time is either of the essence or is extremely important to the applicant or the distributor who is to receive the gas from the pipeline company. For example, gas leases contain provisions for the payment of "shut in" royalties unless the gas is produced and marketed as rapidly as is reasonably possible in accordance with state conservation laws. The need for capital to further develop a lease presents, in many cases, an impelling need to obtain an immediate sale of gas from wells already completed. Many leases contain provisions permitting the lessor to cancel the lease unless the gas is marketed within a specified time. See *In the Matter of Seaboard Oil Co., et al.*, 19 F.P.C. 416, 421 (1958). Indeed, in the instant case, the leases held by the CATCO producers would have been in jeopardy unless production was commenced in 1958 (R. 26a-27a, 78a).

In the light of such facts and in view of the thousands of independent producer certificate applications being handled by the Commission (see F.P.C. Release No. 9920, issued July 8, 1958), to inquire into the justness and reasonableness of initial rates in every producer certificate case where the price

[11] It should be noted that there is not the slightest indication in the record that the 21.4-cent price is unjust or unreasonable. In this regard, the record only shows that it is a higher price than Tennessee is paying under its other gas purchase contracts.

issue is raised, would inevitably result in the bogging down of the Commission's producer licensing functions into a morass of certificate cases turned into *de facto* rate cases. And, in the meantime, the building of new pipelines and the extension and expansion of existing pipelines will most assuredly be delayed or as a practical matter denied, by the delays attendant upon awaiting the outcome of those producer certificate cases.

Tennessee has no desire to pay more than a just and reasonable price for the gas purchased by it. It must be recognized, however, that as of the present, the Commission has been unable to arrive at a satisfactory standard or method by which to determine the proper field prices for gas. The needed expansion of the pipeline industry cannot mark time while the Commission is struggling for a proper formula or standard by which to measure justness and reasonableness of producer prices. So long as the Commission has rate investigatory powers under Section 5(a) of the Act, it is legally justified in facilitating certificate cases, and leaving to Section 5(a) investigations any issues raised as regards price. *Florida Economic Advisory Council* v. *Federal Power Commission*, 251 F. 2d 643, 646 (D.C. Cir., 1957), cert. den., 78 S. Ct. 996.

On facts closely paralleling the facts in this case, the Court of Appeals for the District of Columbia Circuit reached an opposite result in *Oklahoma Natural Gas Company* v. *Federal Power Commission*, 257 F. 2d 634 (1958), certiorari granted November 10, 1958. In both cases certain intervenors sought to have the producer certificates conditioned on a lower price. In both cases the producers advised the Commission in advance that

they would not accept certificates conditioned on a lower price.[12] In both cases the Commission considered the same type of evidence on price, and issued certificates without conditioning them on lower initial prices.

The essential difference between the two cases is in the results reached. In the instant case, the court *sua sponte* held that the Commission was without jurisdiction to issue a certificate once the producers advised the Commission that they were unwilling to accept a price condition. Although the same facts existed in the *Oklahoma Natural* case, the court there held that the Commission did not err or abuse its discretion in refusing to attach a price condition to the certificate.

While the approach of the two courts was different, the fact remains that on essentially identical facts, the Court of Appeals in the *Oklahoma Natural* case reached an opposite—but appropriate result. See also *Florida Economic Advisory Council* v. *Federal Power Commission, supra.*

3. Jurisdiction

The basic issue before the court below was whether the Commission abused its discretion by declining to condition the certificate on a lower initial price. This issue the court did not decide.[13] Instead, the court

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[12] See record pages 477-478 in Case No. 288, in the Supreme Court of the United States, October Term, 1958, *Oklahoma Natural Gas Company* v. *Federal Power Commission.*

[13] We have serious doubts that there can be reversible error for refusing to exercise a discretionary conditioning power. Cf. *Wilbur* v. *United States*, 281 U.S. 206, 218-9 (1930); *Thomas* v. *Vinson*, 153 F. 2d 636, 638 (C.A.D.C., 1946).

sua sponte, decided the case on the jurisdictional basis mentioned above.

Section 19(a) of the Natural Gas Act provides that as a condition precedent to invoking the review authority of the courts, a petitioner must first file with the Commission an application for rehearing setting forth the specific ground or grounds upon which such application is based. Section 19(b) of the Act further provides that:

> "* * * No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. * * *"

The decision of the court below rests on its determination that the Commission lacked authority to issue a certificate once the applicants advised the Commission in advance that they were unwilling to accept a certificate conditioned on a lower initial price. Even assuming, *arguendo*, that this determination is correct (and we submit it is not) the court below was precluded from deciding this case on such ground because it was not first raised before the Commission. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635, 649-651 (1945); 65 S. Ct. 821, 828-829. Courts are also precluded from raising the matter *sua sponte*. *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498-501 (1955); 75 S. Ct. 467, 471-3.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,401

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
Petitioners,

v.

FEDERAL POWER COMMISSION, *Respondent.*

No. 12,403

LONG ISLAND LIGHTING COMPANY,
PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Petitioners,

v.

FEDERAL POWER COMMISSION, *Respondent.*

ON PETITION FOR REVIEW OF AN ORDER OF THE
FEDERAL POWER COMMISSION

Argued March 21, 1958

Before KALODNER, STALEY and HASTIE, *Circuit Judges.*

Opinion of the Court

(Filed June 30, 1958)

By STALEY, *Circuit Judge.*

Serious questions involving the authority of the Federal Power Commission are presented in these petitions to re-

view an order of the Commission granting certificates of public convenience and necessity pursuant to Section 7(e) of the Natural Gas Act, 15 U.S.C. § 717f(e).

Oil leases in the Gulf of Mexico off the shore of Cameron and Vermilion parishes in Louisiana are owned by four independent producers of natural gas, Cities Service Production Company, The Atlantic Refining Company, Tidewater Oil Company, and Continental Oil Company. They are referred to collectively as the CATCO companies. In the early part of September, 1956, CACTO applied to the Federal Power Commission for certificates of public convenience and necessity for authority to sell their natural gas to Tennessee Gas Transmission Company, pursuant to contracts executed in August, 1956. Later in September, 1956, Tennessee Gas itself applied for a certificate of public convenience and necessity for authority to expand its facilities in preparation for the purchase of the gas from CATCO.

The contracts between the CATCO producers and Tennessee Gas provided for an initial rate of 22.4 cents per Mcf (including one cent gathering tax reimbursement), with an automatic increase of two cents every four years thereafter. The highest rate Tennessee Gas had previously paid for natural gas in the area was 18 cents per Mcf. The offshore gas fields in question represent the largest reserve ever committed to one sale, and the sale proposed is the first from the newly developed fields which will provide impressive proportions of future gas supply.

Hearings were begun on the CATCO applications on February 28, 1957. Petitioner Public Service Commission of the State of New York, which exercises general regulatory supervision over the gas industry in that state, intervened in the proceedings. An order of the respondent Commission permitted intervention also of four distributing company customers of Tennessee Gas, namely, Long Island Lighting Company, Public Service Electric and Gas Company, Brooklyn Union Gas Company, and Lake Shore Pipe

Line Company. Tennessee Gas was the only intervenor in favor of the CATCO applications.

In the latter part of March, 1957, the presiding examiner's decision ordered the issuance of certificates of public convenience and necessity to the CATCO applicants without conditions as to price, and conditioned only upon the issuance of a certificate to Tennessee Gas for the construction of its necessary facilities.

After exceptions were filed by intervenors, the respondent Commission issued its order of April 22, 1957. It directed the issuance of temporary certificates to the CATCO applicants, but remanded the proceedings to the examiner to determine what initial rates would accord with public convenience and necessity. After reviewing the circumstances which rendered this sale one of extreme importance both as to initial rate and as to the enormous volume of gas proposed to be sold, the Commission found:

> "Those factors make it abundantly evident that, in the public interest, this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest."

The CATCO applicants moved to modify that order, alleging that the economic risk involved would foreclose their acceptance of temporary certificates issued by the respondent Commission. Further, the applicants proposed to change their contracts so as to give the Commission continuing supervision of the proposed sale and future price increases regardless of any change Congress might make in the Natural Gas Act. The initial rate in the contract would stay at 22.4 cents per Mcf, however. No further evidence as to the reasonableness of the initial rate was presented.

The second order, issued May 20, 1957, demonstrated the Commission's desire to extend itself in an effort to be

fair to the applicants while protecting the ultimate consumers from rates which might later be determined excessive. This order, however, still recognized that there was insufficient evidence in the record on which to base a finding that public convenience and necessity required sale of the gas at the initial rate proposed. The plan embodied in the Commission's order was intended to permit the sale of the gas as soon as possible and was to be effectuated in the following manner. Without remanding the procedings to the examiner, permanent certificates would be issued conditioned upon the initial rate of 18 cents (including the one cent gathering tax reimbursement). The CATCO companies would be entitled to file for a rate increase to 22.4 cents per Mcf to be effective one day after the commencement of gas deliveries to Tennessee Gas.[1]

The Commission reasoned that the consumers would thereby not be relegated to the cumbersome and time-consuming procedure of a Section 5 proceeding where the burden would be on the Commission to show the rates unreasonable and where there are no provisions for refund in the event the Commission is able to meet its burden. The order, though unusual, was deemed necessary by the Commission to protect all parties concerned.

Still the CATCO applicants were not satisfied, and their dissatisfaction this time was expressed by Tennessee Gas in an application for rehearing filed June 4, 1957, which in part states:

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[1] Under Section 4 of the Natural Gas Act, the Commission is empowered to suspend rate increases up to a period of five months, but it waived this power by its promise to the applicants to limit suspension to a 24-hour period. The net result would have been to permit the sale almost immediately at the initial rate proposed in the contracts, allow the CATCO applicants the opportunity of proving by Section 4 proceedings that the rate was just and reasonable, and protect the consumers of Tennessee Gas from overpayment by means of the refund provisions of Section 4 in the event CATCO could not meet its burden.

"Tennessee has been definitely advised by the producer-applicants that they will not amend Section 10 of the contract so as to change the initial rate from 21.4 cents per Mcf to 17 cents per Mcf. [The rates exclude the tax.] Tennessee has been further informed by the producer-applicants that the certificates issued by said order will not be accepted by them for that reason, and that, accordingly, the contracts will be terminated. * * *"

A rehearing was held on June 12, 1957. No further evidence was added to the record. Counsel for the CATCO companies made it clear that unless CATCO received certificates not conditioned with initial rates they might deem objectionable, they would seek to dispose of their gas elsewhere than in the interstate market.

Impressed with this threat, the Commission issued its order of June 24, 1957, in which it granted permanent certificates of public convenience and necessity to the CATCO applicants without any condition affecting the initial price of 22.4 cents per Mcf as originally provided in the contracts with Tennessee Gas. Commissioner Connole dissented. It is this order which petitioners ask us to review.[2]

Tennessee Gas, CATCO, and the Commission argue that the petitioners have no standing to ask this court to review the order of June 24, 1957, because they are not "aggrieved" as required by Section 19(b) of the Act. Essentially, the petitioners represent the ultimate consumers of the gas. In Natural Gas Pipeline Company of America v.

[2] The petitioners pursuing their remedies in this court are Public Service Commission of the State of New York (No. 12,401), and Long Island Lighting Company and Public Service Electric and Gas Company (No. 12,403). Though these are separate petitions for review, we are disposing of both in one opinion. An order of this Court issued October 22, 1957, permitted the CATCO companies and Tennessee Gas to intervene in support of the Commission's order under review.

Federal Power Commission, 253 F.2d 3 (C.A. 3, 1958), cert. pending, we held that a gas transmission company which has passed its increases on to its customers is "aggrieved," since as a matter of ethics and good business, it is required to protect its customers. Here the petitioners are more nearly representative of the ultimate consumers than was Natural Gas Pipeline Company in that case. Furthermore, when it is considered that New York distributors are supplied by Tennessee Gas, that the contract price approved by the Commission's order is 4.4 cents higher than any other price paid by Tennessee Gas, that this is the first sale from new fields which will supply enormous quantities of gas in the future, and that the Commission's order in effect places the burden on the petitioners to show that the rates are unreasonable, it is clear the argument that petitioners are not "aggrieved" is without substance.

The suggestion that petitioners have not exhausted their administrative remedies is equally lacking in merit. The final order of the Commission granted unconditional certificates of public convenience and necessity. Rehearing has been denied. Judicial review is the next step, and the suggestion of unsatisfactory administrative remedies which are no remedies at all cannot displace this review.[3]

The petitioners pose substantially similar questions on the merits of the case, namely, whether the Commission committed error in its order of June 24 in dispensing with the consideration of the element of price because of the threat of the producers to withhold the gas from interstate commerce, after two previous determinations by the Commission that the sale should not be certificated without evidence in the record that the initial rate was just and reasonable. We conceive of the question, however, as a more fundamental one, involving the statutory jurisdiction of

[3] Proceedings under Section 5 of the Act foreclose any possibility of refund to the petitioners of amounts which later may be determined to be excessive.

the Federal Power Commission. It is whether the Commission has authority to consider an application for a certificate under Section 7(e) where the terms of the application limit the scope of the inquiry which the Commission is required to make for a determination of public convenience and necessity.

The Commission is empowered by Section 7(e) of the Natural Gas Act to attach reasonable conditions to its issuance of certificates of public convenience and necessity.[4] One of the conditions the Commission often attaches is the stipulation of the initial rate. The legislative history of Section 7(e) indicates clearly that Congress intended to give the Commission full scope in scrutinizing the rate structure proposed in passing on the issuance of the certificate. Signal Oil and Gas Co. v. Federal Power Commission, 238 F.2d 771, 774, note 3 (C.A. 3, 1956), cert. denied, 353 U.S. 923 (1957). In the Signal Oil case, this court reaffirmed the statutory authority of the Commission to impose rate conditions where the public convenience and necessity required it. When the Signal Oil case was before the Commission, it said that the justness and reasonableness of the rate was a "vital element" in demonstrating "that the service proposed is or will be required by the present or future public convenience and necessity." Cities Service Gas Co., et al., 12 P.U.R. 3d 3, 14 (1955). According great weight to the initial rates proposed has been the policy of the Commission over the years as is indicated in its annual reports to Congress.[5]

While the Commission probably should always consider the impact of the proposed initial rate in its determination

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[4] "* * * The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

[5] See dissent of Judge Bazelon in Oklahoma Natural Gas Co. v. Federal Power Commission, — F.2d —, (C.A.D.C., May 22, 1958).

of public convenience and necessity, we do not reach the question of whether the Commission must fix the initial rate when its inquiry demonstrates that there is a substantial question of the reasonableness of that initial rate. See Oklahoma Natural Gas Co. v. Federal Power Commission, and the dissenting opinion of Judge Bazelon, — F.2d —, (C.A.D.C., decided May 22, 1958).

In the cases before us, the Commission has left no doubt of the importance and necessity of a consideration of the reasonableness of the proposed initial rate. In its first order issued April 22, 1957, the Commission said:

> "The record contains insufficient evidence or testimony, however, on which to base a finding that the public convenience and necessity requires the sale of these volumes of gas at the particular rate level here proposed. The importance of this issue in certificating this sale cannot easily be overemphasized. This is the largest reserve ever committed to one sale. This is the first sale from the newly developed offshore fields from which large proportions of future gas supplies will be taken. This is the highest price level at which the sale of gas to Tennessee Gas has been proposed.
>
> "Those factors make it abundantly evident that, in the public interest, this crucial sale should not be permanently cerificated unless the rate level has been shown to be in the public interest."

Again, in its order of May 20, 1957, the Commission said:

> "* * * As we have already stated, the record does not contain sufficient evidence on which to base a finding that the public convenience and necessity requires the sale of the gas at that particular rate level. * * *"

It was only after the threat of withholding the gas from the interstate market that the Commission retreated from its previous position and granted the certificates with-

out rate conditions by its order of June 24, 1957.[6] Commissioner Connole, in his dissent from this order, puts the problem into sharp focus:

> "The record is plain that the controlling reason the parties refuse to submit their contracts to regulatory review in the manner found to be necessary in the public interest is their preference for a proceeding in which the burden would be on the Commission to establish that the rate was more than reasonable. They flatly refuse to submit to one in which the parties would be required to show only that the rate was required by the public convenience and necessity. No citation of authority or refernece to regulatory theory is needed to demonstrate that the burden of showing the public convenience and necessity requires a proposed service at a particular price level is on the party seeking to take advantage of the proposed service and not on the tribunal before which the case is to be made. Under the unique conditions found here, the critical importance of that decision is indisputable."

The Commission defends its action by claiming the right to change its mind just as a court might do on rehearing, citing Cia Mexicana de Gas v. Federal Power Commission, 167 F.2d 804 (C.A. 5, 1948). The petitioners, however, do not argue to the contrary. Their position is that, since in its first two orders the Commission determined that the record lacked sufficient evidence upon which to base a finding that the sale at the proposed rate would be in the public interest, and as the final order was based upon the

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[6] It is abundantly clear that the Commission changed its mind about the necessity of establishing that the proposed rate was in the public interest only because of the threat of the producers to withhold the gas from the interstate market unless they got certificates upon their own terms. The producers expressed themselves unequivocally through the application of Tennessee Gas for rehearing directed to the order of May 20, 1957, and further in oral argument at that rehearing.

same record, there is still insufficient evidence to support such a necessary finding.

The jurisdiction of the Federal Power Commission is entirely statutory. It acts as an arm of Congress, and only as Congress has directed it. It is empowered to grant certificates of public convenience and necessity by Section 7(e) of the Natural Gas Act.

> "Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. * * *"

The Act entrusts to the Commission, and to the Commission alone, the power and authority to determine the issue of public convenience and necessity. Within the framework of the Natural Gas Act, the Commission alone is entrusted with determining the scope of its inquiry necessary to arrive at the decision of whether to certificate a specific sale. It will be remembered that in its reports to Congress, the Commission has recognized that the element of price is important in determining whether a sale such as this should be approved, and as has been stated above, both the statutes and the courts have recognized the authority of the Commission not only to take price into consideration but to condition a certificate for the sale of gas at a particular rate. In the present case, that the initial rate was a necessary consideration in the scope of inquiry into

the determination of public convenience and necessity has been twice recognized by the Commission, even to the extent that its order of May 20, 1957, in fact conditioned the permanent certificates upon a contract amendment as to the initial price.

The Commission has jurisdiction to issue certificates under Section 7(e) based upon its independent judgment after an untrammelled consideration of all the elements which it deems necessary to arrive at that judgment. Congress has not given the Commission power to inquire into the issue of public convenience and necessity where, as here, the applicant circumscribes the scope of that inquiry by attaching a condition to its application requiring the Commission to forego the consideration of an element which may be necessary in the formulation of its judgment. Otherwise stated, the Commission has not been endowed by Congress with jurisdiction to conduct a *limited* inquiry.

Congress has also made it clear that the applicant must be *willing* to perform the services proposed and conform to the provisions of the Act. The action of the applicants in curtailing the decision-making power of the Commission demonstrates their unwillingness to conform to the provisions of the Act; this in itself would require the denial of the applications. The Commission's function is to regulate the sale of gas by producers willing to sell under regulations arrived at in accordance with the provisions of the Act. Such regulations may not be the result of bargaining with an unwilling seller.

The order of the Federal Power Commission of June 24, 1957, will be vacated, and the proceedings will be remanded to the Commission with directions to proceed in conformity with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

[Caption omitted]

Judgment

This cause came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the order of June 24, 1957 of the Federal Power Commission be, and it is hereby vacated, and the proceedings remanded to the Commission with directions to proceed in conformity with the opinion of this Court.

Attest:

IDA O. CRESKOFF
Clerk

June 30, 1958

Received and Filed
JUN 30 1958
Ida O. Creskoff
Clerk

[Caption omitted]

SUR PETITION FOR REHEARING

Present: GOODRICH, STALEY and HASTIE, *Circuit Judges*

After due consideration the petitions for rehearing in the above-entitled cases are hereby denied.

By the Court

Per Circuit Judge STALEY

Dated:
August 27, 1958

APPENDIX B

UNITED STATES OF AMERICA
FEDERAL POWER COMMISSION

Before Commissioners: Frederick Stueck, Acting Chairman; Seaborn L. Digby, William R. Connole and Arthur Kline.

In the Matters of

CONTINENTAL OIL COMPANY	Docket No. G-11024
THE ATLANTIC REFINING COMPANY	Docket No. G-11034
CITIES SERVICE PRODUCTION COMPANY	Docket No. G-11046
TIDEWATER OIL COMPANY	Docket No. G-11049

Order Upon Application for Rehearing, Adopting Initial Decision of Presiding Examiner With Modifications and Conditions

(Issued June 24, 1957)

On June 4, 1957, Tennessee Gas Transmission Company (Tennessee Gas) filed an application for rehearing and reconsideration of the Commission's order issued in these proceedings on May 20, 1957. By order issued June 6, 1957, we granted rehearing and in such order provided for oral argument "upon the contentions made and issues presented by the application for rehearing, the motion for modification and the answers thereto heretofore filed in these proceedings."[1]

[1] On May 6, 1957, Continental Oil Company, The Atlantic Refining Company, Cities Service Production Company and Tidewater Oil Company (collectively referred to as CATCO) filed a motion for modification of the Commission's order issued April 22, 1957, granting temporary certificates of public convenience and necessity to CATCO and Tennessee Gas and directing that the proceedings "be remanded to the presiding examiner to determine at what rate the public convenience and necessity requires the sale of natural gas by CATCO to Tennessee Gas to be made if these CATCO companies are granted permanent certificates of public convenience and necessity." Answers to the

Pursuant to the order granting rehearing we heard oral argument on June 12, 1957.

The Commission's order issued May 20, 1957, modified an earlier order issued April 22, 1957, granting temporary certificates of public convenience and necessity to CATCO and to Tennessee Gas in Docket No. G-11107.

The temporary certificates issued by our order of April 22, 1957, authorized CATCO to sell natural gas to Tennessee Gas from CATCO's leases in the East Cameron, West Cameron and Vermilion areas off the coast of Louisiana in the Gulf of Mexico, and authorized Tennessee Gas to construct and operate approximately 107 miles of pipeline from the off-shore platforms of CATCO to a point on its main system at Kinder, Louisiana.

The contracts for the sale of gas executed between each of the CATCO companies and Tennessee Gas which are exhibits in these proceedings provide for an initial price of 21.4 cents per Mcf[2] and for a definitely fixed price escalation of two cents per Mcf every four years.

As has been indicated hereinbefore, the CATCO companies filed a motion for modification of the Commission's order issued April 22, 1957. In the motion the CATCO companies indicated that they were unwilling to accept temporary certificates of public convenience and necessity under the conditions specified in the Commission's order. They, however, proposed that the Commission issue permanent certificates permitting them to charge the initial agreed-upon price of 21.4 cents per Mcf, but agreed

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motion were filed by New York Public Service Commission, Lake Shore Pipe Line Company, Brooklyn Union Gas Company and Long Island Lighting Company (jointly), and Public Service Electric and Gas Company (collectively referred to as Interveners) opposing the motion. Tennessee Gas filed an answer supporting the motion.

[2] Reimbursement for the one-cent Louisiana gathering tax would be added to this amount.

to modify therein respective contracts for the sale of natural gas to Tennessee Gas in such manner that the future price escalations contained in the contracts would remain subject to the Commission's scrutiny and jurisdiction in the event the Harris Bill, H.R. 6790, 85th Cong., were enacted into law. The proposed contract amendments would provide that if the Harris Bill were enacted, the price for gas would escalate up to the then current reasonable market price but not more than two cents per Mcf every four years.

In response to the motion we issued our May 20, 1957, order in which we granted permanent certificates of public convenience and necessity to the CATCO companies on condition that the contracts between the CATCO companies and Tennessee Gas be amended so as to provide for an initial price of 17 cents per Mcf, with provision for filing a request for an increase in such price to 21.4 cents per Mcf one day after the initial price became effective. Under the condition provision was also made for the incorporation in such contract of indefinite price escalations, with a ceiling increasing by two cents every four years.

In its application for rehearing filed June 4, 1957, Tennessee Gas has stated that it had been advised that the CATCO companies were unwilling to accept the permanent certificates of public convenience and necessity granted by the May 20, 1957, order because they objected to the pricing and other conditions specified in the order, and that they would terminate the contracts so that the large supply of gas contained in the off-shore reserves of the CATCO companies would not become available to the customers of Tennessee Gas. At the oral argument it became apparent that the CATCO companies objected to the 17-cent initial price set in the May 20, 1957, order. On the other hand, the CATCO companies indicated that they would still be willing to amend their contracts as proposed

in their motion of May 6, 1957. They indicated further that if they failed to obtain certificates without price conditions which they considered objectionable, they would seek to dispose of their gas elsewhere than to Tennessee Gas and the interstate market.

In the present status of the case we are left with the difficult problem of how to assure the delivery of this gas to the large market served by Tennessee Gas, and at the same time protect the consumers from an unreasonably high price. In reaching a solution to this problem we are moved by the primary consideration that the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas. Further, it appears to us, important as is the issue of price, that as far as the public is concerned, the precise charge that is made initially is less important than the assurance of this great supply of gas. In view of these circumstances and the fact that the record does not show that the 21.4 cent rate is necessarily excessive, we agree with the presiding examiner that this certificate proceeding under Section 7 of the Natural Gas Act should not assume the character of a rate proceeding under Section 5(a). We are of the opinion that, in the circumstances of this case, in view of the great demand for gas by customers of Tennessee Gas, the price consideration should not be made the prime determinant of what the public convenience and necessity require. By virtue of the authority conferred upon us by Sections 4 and 5 of the Natural Gas Act and the proposal to modify the contracts made by the CATCO companies, we are of the opinion that we will be able to adequately protect the public interest with respect to the matter of price. In order, therefore, to insure that deliveries of gas by the four CATCO companies to Tennessee Gas will commence as promptly as possible, we will grant permanent certificates to them by this order without any condition affecting the initial price of 21.4 cents per Mcf.

However; because the 21.4 cent price, as we have heretofore observed, is higher than Tennessee Gas is paying under any other contract, it should be subject to prompt investigation under Section 5 (a) as to its reasonableness. In this connection, we may note that when three of the CATCO companies, Continental Oil, Atlantic Refining and Tidewater Oil file their contracts with Tennessee Gas as rate schedules as required by the Natural Gas Act and our Regulations, such contracts will be subject to rate investigations now outstanding against these companies. Thus, by our order issued January 27, 1956, in Docket Nos. G-9283 and G-9284, we instituted an investigation of any of the rates or charges of Atlantic Refining and Tidewater Oil with respect to any transportation or sale of natural gas subject to our jurisdiction, and by our order issued the same day in Docket No. G-9279, we instituted a similar investigation of the rates and charges of Continental Oil. Concurrently with this order we are instituting in Docket No. G-12780 an investigation of the rates and charges of Cities Service. By this means relief can be afforded to the consuming public if it should be found that the 21.4-cent initial rate to be charged for the offshore gas is excessive.

It appears to be true that if the Harris Bill, H.R. 6790, 85th Congress, or some bill similar to it, becomes law that we may lose continuing supervision over the future increased prices provided in the several contracts between the CATCO companies and Tennessee Gas. Therefore, we shall adopt the proposal of the companies made in their motion for modification of May 6, 1957, that they amend their contracts so that the price increases will remain subject to our control by using "indefinite pricing clauses" rather than "definite pricing clauses" within the meaning of the Harris Bill. They propose to do this, as indicated above, by providing that the initial sales price shall be 21.4 cents per Mcf until November 1, 1962, as at present, but after that the "reasonable market price" within the

meaning of the bill and as determined by this Commission shall prevail. Adjustments would be initiated by the sellers at four-year intervals but would be limited by the step increases now provided in the contracts. The CATCO companies state that Tennessee Gas is agreeable to this arrangement and will enter into such an amendment with each of the CATCO companies.

The Commission finds:

(1) It is necessary and appropriate in the public interest to adopt the initial decision of the presiding examiner with modifications and conditions and to modify the Commission's order issued May 20, 1957, in the above-entitled proceedings, in the manner set forth below.

(2) The CATCO companies are able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Natural Gas Act, and the requirements, rules, and regulations of the Commission thereunder.

(3) The sales of natural gas by the CATCO companies to Tennessee Gas, as referred to above, together with the construction and operation of any facilities subject to the jurisdiction of the Commission necessary therefor, are required by the public convenience and necessity, and permanent certificates therefor should be issued as hereinafter ordered and conditioned.

The Commission orders:

(A) Permanent certificates of public convenience and necessity are hereby issued to the CATCO companies, without further hearing, authorizing the sale of natural gas to Tennessee Gas, from CATCO's leases in the East Cameron, West Cameron and Vermilion areas off the coast of Louisiana in the Gulf of Mexico, together with the construction and operation of any facilities, subject to the jurisdiction of the Commission, used for such sale, as here-

inbefore described and as more fully described in the applications in this proceeding.

(B) Each of the CATCO companies, within 20 days after the issuance of this order, shall file with the Commission a duly executed amendment to the contract submitted as an exhibit to its certificate application providing for sale of natural gas to Tennessee Gas embodying the following language:

> If and in the event that H. R. 6790 or any substantially similar legislation is enacted into law by the 85th Congress, and becomes effective, then the provisions of Section 10, *Prices*, commencing with the portion thereof reading
>
> "From the date of initial delivery or
> November 1, 1957, whichever occurs first,
> until November 1, 1962 .....21.4 Cents per MCF"
>
> to and including that portion thereof reading
>
> "From November 1, 1986 to expiration
> of this contract .....35.4 Cents per MCF"
>
> is hereby deleted, and the following is substituted in lieu thereof:
>
> From the date of initial delivery or
> November 1, 1957, whichever occurs first,
> and thereafter .....21.4 Cents per MCF
>
> Provided that, After November 1, 1962, Seller shall be entitled to receive and Buyer shall pay the reasonable market price, if higher than 21.4 cents per Mcf, for the gas at the points of delivery within the limitations and subject to the terms and conditions as hereinafter set forth. Such reasonable market price shall be that as fixed by the Federal Power Commission under applicable law, after initial determination thereof by Seller as herein provided. If Seller should

determine that the reasonable market price for the gas at the points of delivery for any of the 4-year periods hereinafter listed would be in excess of the price then being paid hereunder, Seller may notify Buyer, not less than eight months prior to the commencement of such period, of the price to be paid by Buyer hereunder during such period and until a subsequent determination by Seller in accordance herewith is made effective. Any price so determined and fixed shall be not less than 21.4¢ per Mcf and not more than:

23.4 Cents per MCF	From November 1, 1962 to November 1, 1966
25.4 Cents per MCF	From November 1, 1966 to November 1, 1970
27.4 Cents per MCF	From November 1, 1970 to November 1, 1974
29.4 Cents per MCF	From November 1, 1974 to November 1, 1978;

and, in the event the term of this contract is extended hereunder beyond November 1, 1978, then not more than

31.4 Cents per MCF	From November 1, 1978 to November 1, 1982
33.4 Cents per MCF	From November 1, 1982 to November 1, 1986
35.4 Cents per MCF	From November 1, 1986 to the expiration of this contract.

Except as altered hereinabove, the provisions of Section 10, *Prices,* shall remain unaffected and in full force and effect.

(C) The certificates issued herein shall be accepted in writing and under oath by each of the CATCO parties, each of whom shall be authorized to commence service

upon acceptance and upon completion of construction of the "offshore facilities" by Tennessee Gas. Each acceptance shall be accompanied by a resolution of the Board of Directors of the accepting company duly authenticated indicating the approval of the acceptance of the certificates hereby granted.

(D) The certificates issued herein are not transferable and shall be effective only so long as each CATCO company continues the acts or operations hereby authorized in accordance with the provisions of the Natural Gas Act, and the applicable rules, regulations and orders of the Commission.

(E) The grant of the certificates herein shall not be construed as a waiver of the requirements of Section 4 of the Natural Gas Act, or of Part 154 of the Commission's Rules and Regulations thereunder requiring the filing of rate schedules for the services herein authorized; and is without prejudice to any findings or orders which have been or may hereafter be made by the Commission in any proceeding now pending or hereafter instituted by or against the CATCO companies. Further, our action in this proceeding shall not foreclose nor prejudice any future proceedings or objection relating to the operation of any price or related provision in the gas purchase contracts herein involved.

(F) The findings of fact and the conclusions of the presiding examiner are hereby adopted except where inconsistent with this order.

(G) Our order issued May 20, 1957, is hereby modified to the extent that it is inconsistent with this order.

By the Commission. Commissioner Connole dissenting.

J. H. Gutride
Joseph H. Gutride,
Secretary.

In the Matters of

CONTINENTAL OIL COMPANY, *et al.* Docket No. G-11,024, *et al.*

(Issued June 24, 1957)

CONNOLE, Commissioner, *dissenting*:

The manifest unwillingness of the producers here involved to submit to properly constituted public authority the prices at which they propose to make these significant sales in interstate commerce has precipitated a crisis for consumers and Commission far out of proportion to the importance of the immediate proceeding. The depth of the crisis was well expressed at the oral argument of June 12, 1957. Producers represented that unless we abandoned our position in this matter it would be their decision to withdraw this gas from the interstate market. Representatives of consuming interests and of metropolitan distributing companies contended it would be preferable to risk curtailment of expansion and, by necessary implication, certainty of supply rather than to permit the Commission to depart from the position taken in our prior Orders in this docket.

This proceeding is another example of the manner in which the skyrocketing demand for natural gas is severely straining the industry's price structure. Demand threatens to elevate price levels beyond customer tolerance. As a result each proposed sale at new high price levels must be evaluated with particular care. Avoiding the disastrous consequences of a collision between consumers' needs for additional gas and producers' demands for additional compensation is particularly difficult in this proceeding because producers have presented the Commission with an almost classic Hobson's choice. In addition, the issues have become expanded in scope and effect until far more than the initial price level of this particular sale is involved. As I see it, the validity of the Commission's

judicially approved right to attach a rate condition to certificates of public convenience and necessity when it is called for, and in fact, the very inviolability of all Commission orders is at issue here.

It is clear from the history of this proceeding that we have made unprecedented efforts to ensure fair treatment, that we have clearly evidenced our intention to cooperate in arriving at an initial price level that would be just and reasonable to all parties affected. Despite these efforts, however, the producers remain adamant. Despite ample administrative and judicial authority to the contrary[1] they insist that a proposal to make a sale of natural gas in interstate commerce is not subject to regulatory review to determine if the public interest requires that it be made at the prices proposed.

The record is plain that the controlling reason the parties refuse to submit their contracts to regulatory review in the manner found to be necessary in the public interest is their preference for a proceeding in which the burden would be on the Commission to establish that the rate was more than reasonable. They flatly refuse to submit to one in which the parties would be required to show only that the rate was required by the public convenience and necessity. No citation of authority or reference to regulatory theory is needed to demonstrate that the burden of showing the public convenience and necessity requires a proposed service at a particular price level is on the party seeking to take advantage of the proposed service and not on the tribunal before which the case is to be made. Under the unique conditions found here, the critical importance of that decision is indisputable.

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[1] See *Cities Service Gas Co., Signal Oil and Gas Co.*, 14 F.P.C. Opinion No. 288, Nos. G-2569, G-2570, November 28, 1955, affirmed as *Signal Oil and Gas Co.* v. *F.P.C.*, 238 F.2d 771 (CA3), *certiorari* denied 353 U.S. 923.

So much has been said in other forums, so many and so unanimous are the authorities in support of it, that to argue the validity and equity of the procedure contemplated by our prior Orders and supported by the *Signal Oil* case, *supra,* would serve no useful purpose now. At this tardy date the unbeliever needs inspiration, not persuasion, if the veil of obstinacy is to be removed from his eyes.

Of more immediate consequence, however, is the dilemma into which the refusal has placed this Commission and the consumers whose interest we must protect: Denial of essential supplies on the one hand, and on the other, inadequate protection against unjust and unreasonable rates.

It contributes nothing to argue that the issue here is sanctity of contract. When it applies, no one feels the force of that argument more keenly than I. And when it was threatened, I spoke out against it. For example, see my separate statement *In the Matters of American Louisiana Pipe Line Company, et al.,* G-10396, *et al.,* issued January 11, 1957.

But no contract terms are involved here. No party questions the manner in which the other has carried out its part of a bargain. If anything, an essential party to the contracts has been crowded out of the bargaining table. And rather than to permit the public interest a place, the bargainers would turn the table upside down and walk away from the entire proceeding.

Plain facts are that the gas has been placed on the interstate market on one set of terms and one only. This Commission and the consumers who have made irrecoverable investments in order to use it, are given no choice but to accept. The arbitrary nature of this position appears from an examination of the orders which have been rejected by the producers.

No voice has been raised to dispute the facts that were set out so clearly in our Order of April 22, 1957. To my legal understanding, they are still facts. A few sentences will illustrate (pg. 2, mimeo):

> "The record contains insufficient evidence or testimony however, on which to base a finding that public convenience and necessity requires the sale of these volumes of gas at the particular rate level here proposed. The importance of this issue in certificating this sale cannot easily be over-emphasized. This is the largest reserve ever committed to one sale. This is the first sale from the newly developed offshore fields from which large proportions of future gas supplies will be taken. This is the highest price level at which the sale of gas to Tennessee Gas has been proposed.
>
> "These factors make it abundantly evident that, in the public interest, this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest. . . ."

No effective objection has been made to our Order of May 20, 1957. The upper limit of the price range used by the Commission in that Order was set by the contracts themselves which the record discloses contain the highest of at least four bid prices. The lower limit was urged by disinterested public authority intervenors and supported by evidence of record showing, among other things, that it was the highest price presently being paid by Tennessee Gas for the purchase of any gas produced in the Southwest area. Effectively, the Order provided a floor which the rates would not penetrate, an assurance notably lacking in the Section 5(a) procedure so zealously embraced by the applicants. And still the refusal persists.

Nothing but threats by the producers supports the proposition that this gas would be barred forever from the

interstate market. And the very quantity of offshore gas affected by this decision makes it clear that the only practical market for gas of this kind for years to come is to the large consuming areas served by the long haul interstate pipelines. In my judgment the pricing pattern should not be set for so crucial a supply source in an atmosphere charged with urgency and in response to arguments whose primary motivation is private, not public, gain. The election by the producers to reject their public responsibility and insist on exercising the full strength of their bargaining position has altered completely the impact of logical and equitable arguments.

The decision of the majority is justifiable only by the evil consequences of the loss of these reserves to the particular pipeline which is a party to the contracts. Such evils would, in the opinion of the majority, exceed the gain to follow from the proof that the public convenience and necessity does not require the sale of this gas at proposed rates.

In my opinion, the consequences of abandoning our position will be more serious than their effect on this particular sale. Whether by design or accident, the issues in this proceeding now transcend the close limits of the original hearing. At stake is the question whether the Commission should hold a position which it has determined is in the long run public interest, or whether it should abandon it when confronted with allegations that short run injury to one segment of the industry and consumers might result. Where the issue is reduced to this simple statement, the answer is clear.

Majority quite properly are concerned that persisting in either our April 22 or our May 20 Order will result in cancellation of the CATCO-Tennessee contracts. I agree it probably would. And quite understandably the majority refuses to permit a few distributing companies and one Public Service Commission to dictate the interests of

all other consumers on Tennessee's lines. Unfortunately, however, there is more to this issue.

As concerned as I am for Tennessee's customers, I am more concerned for the whole body of consumers on *all* transmission pipe lines for whose protection we are responsible. And as deserving of preservation as I believe those particular Orders to be, I believe the principle that Federal regulatory Orders should not be changed by threats of abandoning public responsibility is even more important.

On balance, and in view of the expansion of the issues beyond those originally contemplated by this docket, I believe it more important to the public interest to preserve the Commission's authority to make lawful and necessary orders than it is to preserve these contracts as written. The right to maintain valid orders against allegations of urgency, the importance to the consumer of the *Signal Oil* doctrine, and the right of *all* consumers for protection against unreasonable initial rates outweigh the potential damage to the consumers of Tennessee Gas Transmission which might flow from maintaining the position I urge here.

While dissenting may appear to serve no useful purpose, the damage to consumer and to the public interest, to the regulatory process, and to the future of the interstate natural gas business as it is given me to discern it, would be such under the majority decision that, inevitable as that decision may appear to be, I am left no choice but to protest it by filing a dissenting vote.

I dissent from the action of the majority in this cause.

WILLIAM R. CONNOLE,
Commissioner

APPENDIX C.

The pertinent provisions of the Natural Gas Act of June 21, 1938, c. 556, 52 Stat. 821, as amended by Act of February 7, 1942, c. 49, 56 Stat. 83; 15 U.S.C. 717-717w, are as follows:

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commisison shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * * * * * * *

SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of

natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportaiton facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

* * * * * * * * * *

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. * * *

* * * * * * * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

* * * * * * * * * *

SEC. 19 (a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considerd by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable

ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modfying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended * * *.

* * * * * * * * * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

Nos. 518 AND 536

THE ATLANTIC REFINING COMPANY, *et al.*,
Petitioners,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *et al.*,
Respondents.

TENNESSEE GAS TRANSMISSION COMPANY,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *et al.*,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR RESPONDENTS LONG ISLAND LIGHTING COMPANY AND PUBLIC SERVICE ELECTRIC AND GAS COMPANY

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December 2, 1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

Nos. 518 AND 536

THE ATLANTIC REFINING COMPANY, *et al.*,
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ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR RESPONDENTS LONG ISLAND LIGHTING COMPANY AND PUBLIC SERVICE ELECTRIC AND GAS COMPANY

Long Island Lighting Company and Public Service Electric and Gas Company, respondents in each of the above-captioned proceedings, urge this Court to grant the petitions for certiorari (except with respect to Question 4 presented in No. 518 and Question 3 presented in No. 536) for the following reasons:

1. Said respondents agree that the views herein of the Court of Appeals for the Third Circuit reported *sub nom. PSC* v. *FPC*, 257 F. 2d 717, as to the responsibilities and powers of the Federal Power Commission with respect to initial rates of natural gas producers conflict with those of the Court of Appeals for the District of Columbia in *Oklahoma Natural Gas Co.* v. *FPC*, 257 F. 2d 634, *cert. granted*, November 10, 1958. Neither decision provides a reliable guide to the Commission for the proper disposition of the large number of cases involving initial rate issues now before it. Resolution of the conflict by this Court for the guidance of the Commission is desirable.

2. The upward spiral of producer rates for newly-committed gas, resulting from the great expansion of the industry in a seller's market, makes the question of initial rates of great importance in the administration of the Natural Gas Act. The Commission has the power to reduce initial rates, once established, to just and reasonable levels only by Section 5 proceedings which are lengthy (not a single one involving producers of natural gas having been completed to date) and which can result only in a prospective rate order.

But the Commission has effectual alternatives. It can forestall unwarranted prices by issuing certificates of public convenience and necessity under Section 7 conditioned on rate reductions. *Signal Oil & Gas Co.* v. *FPC*, 238 F. 2d 771 (3d Cir. 1956), *cert. denied*, 353 U. S. 923 (1957). In fact, in the instant proceedings the Commission went further; it required a reduction in the initial rate, but provided that after one day the producers would be allowed to file the higher rate, the contract amount, which would be permitted to go into effect under bond without any suspension. Thus the producers would be allowed to keep the full contract amount if found to be "just and reasonable" under Section 4, but consumers

would not be obliged to pay that amount if the producers could not justify it. Then, without further hearings, because of the producers' concerted threat to withhold the gas, the Commission abandoned this approach which is so eminently fair to buyer and seller as well as to the consuming public.

The great importance to the gas industry and to the public of the initial rates at which gas is now being marketed, coupled with the failure of the Commission to insist on some technique such as the earlier order herein which would protect the public while the reasonableness of the rate is being examined, makes it desirable for the Court to consider the present case as well as the *Oklahoma Natural Gas* case and to settle the crucial initial rate problem. However, these respondents believe that neither Question 4 presented in the petition in No. 518 nor Question 3 presented in the petition in No. 536 warrant the attention of this Court.

Respectfully submitted,

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December 3, 1958.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 518

THE ATLANTIC REFINING COMPANY,
CITIES SERVICE PRODUCTION COMPANY,
CONTINENTAL OIL COMPANY,
TIDEWATER OIL COMPANY,

Petitioners,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
LONG ISLAND LIGHTING COMPANY, and
PUBLIC SERVICE ELECTRIC AND GAS COMPANY,

Respondents.

No. 536

TENNESSEE GAS TRANSMISSION COMPANY,

Petitioner,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK,
LONG ISLAND LIGHTING COMPANY, and
PUBLIC SERVICE ELECTRIC AND GAS COMPANY,

Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

MEMORANDUM FOR THE PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK.

The Public Service Commission of the State of New York does not oppose the grant of *certiorari* in this case.

We believe that the Court of Appeals for the Third Circuit correctly determined that the Federal Power Com-

mission acted improperly in granting unlimited, unconditional certificates of public convenience and necessity to the petitioners herein.

The Commission had on two occasions correctly found that the record before it contained insufficient evidence to support a determination that public convenience and necessity required certification of the proposed sales upon the terms sought by the petitioners—viz., at the unprecedentedly high price of 22.4¢ per Mcf. That evidentiary deficiency was never supplied. In that situation, under the statute (Natural Gas Act, Section 7), the Commission had two alternatives: (1) to issue certificates to the extent authorized by the proof—i.e., limited thereto or conditioned upon modification of the sales contracts to accord therewith—as the Act authorizes, or (2) to deny the applications, as the Act commands.

The record proof demonstrated the propriety of certification of the proposed sales at an initial price no higher than 17¢ per Mcf, the highest price being paid in the area by the pipeline purchaser (Tennessee) pursuant to previous FPC certifications. The justness and reasonableness of that price was already the subject of proceedings under Sections 4 or 5 of the Act, then pending against most of the petitioner-producers and involving similar interstate sales in the Louisiana production area. The scope of those proceedings could readily have been expanded to include the instant sales. Such 17¢ certificates would have maintained the status quo in the area respecting the general price level. Pending determination of the rate proceedings the pipeline purchaser—and through it, the consumer—would not have been subjected to wholly unjustified price burdens. Thus, pursuit of alternative course of action (1) was reasonably called for under the circumstances, rather than the more drastic course (2).

However, the Commission in its final determination here pursued neither. Instead, prompted solely by voluble but quite unrealistic threats by the producer-applicants to withhold their huge quantities of gas from the interstate market unless certificates were granted to them conforming precisely to their applications and unconditionally approving the initial price they specified, the Commission elected to dispense with the necessity for any demonstration of the propriety of that price. Thereby, the Commission dispensed with the necessity for proof pertaining to the "prime determinant" of any producer certificate application under Section 7—the fundamental aspect of the applicant's burden to establish public convenience and necessity for consummation of the proposed interstate sale. In other words, the Commission abjectly surrendered to the applicants' demands. In this, we respectfully submit the Commission was in error, no matter how denominated. We contended below that the Commission action was contrary to law and, under the circumstances, abusive of its discretion, arbitrary and capricious. The Court below thought it even worse and denominated it as in excess of the Commission's statutory jurisdiction. The appellation is immaterial. The point is, the Commission's action was contrary to law.

Therefore, this respondent urges that certiorari be denied in so far as the petitions request review of the propriety of the Circuit Court's denomination, or description of the legal effect, of the Commission's action. (Question Presented 4 in No. 518 and Question Presented 3 in No. 536.) That claimed error was predominantly relied upon by petitioners in their applications for rehearing in the Court below. Their applications were denied. It constitutes the major thrust of their petitions here. There is no dispute whatever as to the law on that issue. The Court below, by its denial of rehearing, correctly held that it had

not transgressed the statutory prohibition against resolution of issues not raised below. There is no conflict, on that issue, among the circuits or with the decision in any other proceeding presently before this Court. It is entirely subordinate and tangential to the major questions presented by the instant petitions, and of insufficient independent importance to merit review by this Court.

However, we agree that this case presents basic issues respecting the prerogatives and duties of the Federal Power Commission in the disposition of Section 7 applications. Since the *Signal* case* the Commission has been rent with discord respecting the proper and lawful exercise of its prerogative to issue limited certificates or certificates containing initial price reduction conditions. In addition, the Courts of Appeal are not in complete accord in their approach to the problem as is indicated by comparison of the decision below with that in *Oklahoma Natural Gas Company* v. *Federal Power Commission*, 257 F. 2d 634, certiorari granted November 10, 1958 (No. 288, Oct. Term, 1958). Meanwhile, in the absence of any restraint by the Commission or insistence by it upon demonstration of justification for boosting the prevailing price level in a given production area, initial producer prices have run rampant. In the area here involved, for instance, they have leaped progressively from 9¢ per Mcf to 17¢ per Mcf to the instant 22.4¢ per Mcf in less than four years. And in the current unrestrained sellers market and under the current Commission policy of unconditional surrender to producer price demands, the sky is the limit. See *Re Texaco Seaboard, Inc.*, 20 F. P. C. ....., Opinion 315, issued September 4, 1958. Accordingly, because of

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* *Re Cities Service Gas Company*, 14 F. P. C. . , 12 PUR 3d 3, reh. den. 15 F. P. C. 1020, aff'd, *sub nom Signal Oil and Gas Company* v. *Federal Power Commission*, 238 F. 2d 771 (C. A. 3, 1956), cert. den. 353 U. S. 923 (1957).

the vital importance of the basic issues involved, the frequency with which they have arisen and with which they will continue to arise, we believe that the discord within the Commission upon the basic fundamentals of a Section 7 proceeding should be resolved by this Court. *Oklahoma Natural Gas Company* v. *Federal Power Commission, supra,* does not present that basic divergence.

For these reasons and without conceding in any degree the validity of any of the arguments advanced by petitioners in their quest for certiorari herein, the Public Service Commission of the State of New York believes that this case should be reviewed by this Court concurrently with *Oklahoma Natural Gas Company* v. *Federal Power Commission* (No. 288). To permit thereof we urge favorable disposition of the instant petitions, to the extent herein indicated.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1958

No. 518

THE ATLANTIC REFINING COMPANY,
CITIES SERVICE PRODUCTION COMPANY,
CONTINENTAL OIL COMPANY, AND
TIDEWATER OIL COMPANY,

Petitioners,

v.

PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,
LONG ISLAND LIGHTING COMPANY, AND
PUBLIC SERVICE ELECTRIC AND GAS COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

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BORG PRINTING COMPANY OF TEXAS, HOUSTON, TEXAS

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In The

Supreme Court of the United States

October Term, 1958

No. 518

The Atlantic Refining Company,
Cities Service Production Company,
Continental Oil Company, and
Tidewater Oil Company;

Petitioners,

v.

Public Service Commission of the
State of New York,
Long Island Lighting Company, and
Public Service Electric and Gas Company,

Respondents.

On Writ of Certiorari to the United
States Court of Appeals for the
Third Circuit

BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the Court of Appeals (R. 653) is reported at 257 F. 2d 717. The order of the Federal Power Commission (R. 484), issued June 24, 1957, is reported at 17 F.P.C. 880.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1958 (R. 663). Petitions for rehearing were denied on August 27, 1958 (R. 666-667). The petition for writ of certiorari was filed on November 25, 1958, and was granted on January 12, 1959 (R. 669). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1) (1948) and Section 19(b) of the Natural Gas Act, 52 Stat. 831 (1938), 15 U.S.C. 717r(b) (1952).

STATUTES INVOLVED

This proceeding involves an interpretation of the authority and discretion of the Federal Power Commission under Sections 7(c) and 7(e) of the Natural Gas Act [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942), 15 U.S.C. 717f(c) (1952), and 56 Stat. 84 (1942), 15 U.S.C. 717f(e) (1952)], and an interpretation of the power of the reviewing court under Section 19(b) of the Natural Gas Act [52 Stat. 831 (1938), 15 U.S.C. 717r(b) (1952)].[1]

QUESTIONS PRESENTED

1. Whether Section 7 of the Natural Gas Act vests the Federal Power Commission with the administrative discretion to certificate sales of gas by independent producers without determining that the proposed initial contract rate is just and reasonable under the standards provided in Sections 4 and 5 of the Act?

2. Whether an applicant's refusal to accept a conditional certificate deprives the Commission of authority, on rehearing, to issue an unconditional certificate?

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[1] For convenience of the Court and in accordance with Rule 40(c) of the Supreme Court Rules, the pertinent portions of the Natural Gas Act are set out in the Appendix hereto, *infra*, pp. 1a-14a.

3. Whether Section 19(b) of the Act precludes a reviewing court from reversing a Commission certificate order on the ground, not urged at any time before the Commission or the court, that the Commission lacked statutory jurisdiction to consider the certificate application because the applicant previously refused to accept a conditional certificate?

STATEMENT

This proceeding involves an order of the Federal Power Commission ("Commission") certificating the sale of natural gas to Tennessee Gas Transmission Company ("Tennessee") by The Atlantic Refining Company, Cities Service Production Company, Continental Oil Company and Tidewater Oil Company ("Producers"),[2] in accordance with the terms of the gas sales contracts between each of the Producers and Tennessee (R. 489). The Court of Appeals vacated the Commission's order upon its *sua sponte* determination that the Commission lacked statutory jurisdiction to grant the certificates (R. 653).

1. Factual Background.

Each Producer owns a 25 per cent interest in gas leases covering about 95,000 acres located in the Gulf of Mexico, 25 to 30 miles offshore Cameron and Vermilion Parishes, Louisiana (R. 25-26, 64, 280). These leases were issued by the State of Louisiana, and have been continued in effect by the Outer Continental Shelf Lands Act [R. 26, Act of August 7, 1953, 67 Stat. 462, 43 U.S.C., 1331-1343 (Supp. I, 1954)]. Continental Oil Company was designated operator of the properties (R. 23). Platforms were constructed in the Gulf of Mexico and wells were drilled and completed (R. 25).

[2] These four independent producers have sometimes been referred to as the CATC or CATCO Companies. However, since each has a separate status and since there is no CATC or CATCO entity, these four certificate applicants are more accurately referred to herein as "Producers".

Each Producer entered into a separate contract to sell its share of the production from the leases to Tennessee (R. 23-25). These contracts provided that each of the parties thereto would file with the Federal Power Commission the necessary applications for certificates of public convenience and necessity, and that such applications would be prosecuted with diligence to the end that certificates would be issued on or before April 1, 1957; and that if any of such applications were denied or if *satisfactory* certificates had not been issued by April 1, 1957, either party could terminate and cancel the contract (R. 28, 287-288).

Under these four contracts, Tennessee acquired a dedication of two trillion cubic feet of natural gas for its system (R. 25). Deliveries to Tennessee under these contracts will approximate 240 million cubic feet of natural gas per day for 20 years (R. 45, 209-210). The initial contract price for such gas is 21.4 cents per Mcf (R. 310, 566).[3] There is no price in the area other than that stipulated by the parties since there were no other sales of gas in the West Cameron, East Cameron and Vermilion offshore areas here involved prior to this sale (R. 43-44). Because the Producers' leases are not in any of Tennessee's Louisiana pricing districts, the proposed sales will not cause economic disruption of existing price structures and will not "trigger" favored-nation or price-redetermination clauses in other contracts (R. 43, 148-159).[4]

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[3] The price of 21.4 cents per Mcf is exclusive of reimbursement for Louisiana gathering or severance taxes. The amount of this tax reimbursement has varied from time to time. At the present time, there is no effective gathering tax reimbursement. The present severance tax reimbursement is 1.5 cents per Mcf. To avoid confusion, prices referred to throughout this brief are exclusive of tax reimbursement.

[4] Typically, favored-nation clauses provide that a purchaser will increase the price paid under contract to equal a higher price paid by that purchaser to another seller within a defined pricing area, or to equal a higher price paid by another purchaser. Price-redetermination clauses typically provide for redetermination of the price paid under contract on the basis of the three highest prices paid in a defined pricing area.

2. Proceedings Below.

During August and September, 1956, the Producers filed applications for certificates of public convenience and necessity requesting authorization for sales to Tennessee in accordance with the terms of their contracts. Respondents, the Public Service Commission of the State of New York ("PSC"), Long Island Lighting Company ("Long Island Lighting"), and Public Service Electric and Gas Company ("Public Service"), intervened in opposition to the proposed sales (R. 330). No evidence was offered by these intervenors.

Tennessee intervened in support of the Producers' applications and adduced evidence showing the advantages which would accrue to it and the public interest from certification of the sales (R. 338-339).

The Presiding Examiner granted certificates to the Producers (R. 498). Upon exceptions to his decision, the Commission issued three successive orders, the last of which is under review. The first order, issued April 22, 1957, granted Producers temporary authority to make the sales, while remanding the proceedings to the Presiding Examiner for further hearing to determine "at what rate the public convenience and necessity" require the sales to be made (R. 519, 523-524). This action was coupled with adoption of the Examiner's findings that such volumes of gas were needed and that the Producers were ready and able to deliver, which findings the Commission held "argue conclusively that the sales are necessary in the public interest" (R. 521).

Because of the unsettled state of the law, particularly with regard to determination of producer rates, the Producers deemed it imprudent to accept the temporary certificates

and filed an application for rehearing (R. 396).[5] Acting upon this application, the Commission issued its order of May 20, 1957 (R. 526). In this order, the Commission referred to the "need for the volumes of gas" mentioned in its April 22 order and decided to issue permanent certificates to the Producers, but reduced the initial contract rates from 21.4 cents per Mcf to 17 cents per Mcf (R. 528, 530).[6] The May 20 order was further conditioned to provide for amendments to the sales contracts enabling the Producers to file applications to increase the 17-cent rate to the original contract rate of 21.4 cents per Mcf. The indicated purpose of the Commission was to fix the initial contract rate at 17 cents and permit the Producers to collect the original initial contract price of 21.4 cents, subject to refund, after the 17 cent price had been effective for one day (R. 528-529).[7] The Producers were afforded thirty days within which to file acceptance of the tendered certificates (R. 532). Before expiration of such thirty-day period, however, they decided that such conditional certificates were not satisfactory and so notified Tennessee (R. 418).

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[5] Because of the possibility of loss of leases and other economic uncertainties inherent in the operations, the final outcome of the certificate proceedings was necessarily a factor of considerable importance to the Producers in determining whether they would commence deliveries in any manner other than under a final certificate, as proposed. Although the Commission had asserted regulatory jurisdiction over Producers' rates following *Phillips Petroleum Company* v. *State of Wisconsin*, 347 U.S. 672, issued June 7, 1954, no criteria for fixing the just and reasonable rates of producers had evolved, or have yet become available. In such circumstances, Producers deemed the uncertainties attendant upon acceptance of the temporary certificates an undue business risk.

[6] In the May 20 order the Commission did not determine the reasonableness of the 17-cent price, but on the contrary, expressly stated that it was not determining that such price "is the proper price under the standards of the Act" (R. 529). Of course, the Commission was not required to make any such determination in this Section 7 certificate proceeding.

[7] Section 4(e), 52 Stat. 822 (1938), 15 U.S.C. 717c(e) (1952), *infra*, p. 1a. Under Section 4(e), the power to order refunds is dependent upon the prior suspension of the increased rate. It should also be noted that an initial rate schedule, such as here involved, "cannot be suspended" by exercise of the powers conferred on the Commission by the Act, as the Commission recognizes in its own Rules [18 C.F.R. 2.4(d), 252].

Faced with the loss of these huge gas reserves, Tennessee filed an application for rehearing of the May 20 order (R. 416). The Commission granted rehearing, heard oral argument and thereafter issued its order of June 24, 1957, which is here under review (R. 424, 484). The June 24 order made clear the Commission's objective to assure commitment of "this great supply" to the interstate market (R. 487). To that end, the Commission decided to postpone a determination of the reasonableness of the initial rate to rate proceedings under Section 5 of the Act, thus according to the certificate proposals here the same treatment it had accorded with regularity to the certificate proposals of other producers. As to three of the Producers, the Commission noted that Section 5 proceedings were already under way and, as to the fourth, it simultaneously instituted a Section 5 investigation (R. 488). "By this means," said the Commission, "relief can be afforded to the consuming public if it should be found that the 21.4-cent initial rate to be charged for offshore gas is excessive" (R. 488). Applications for rehearing of the June 24 order, filed by PSC, Long Island Lighting and Public Service, were denied by order issued August 15, 1957 (R. 447, 458, 466, 541).

Upon petitions for review filed by PSC, Long Island Lighting and Public Service, the Court of Appeals for the Third Circuit vacated the order of the Commission (R. 653). The Court did not decide the case on any issue raised by the PSC, Long Island Lighting or Public Service but, on objection raised *sua sponte*, held that the Commission lacked statutory jurisdiction to consider the Producers' applications because they had indicated an unwillingness to accept certificates containing conditions reducing their initial contract rates (R. 658).

SUMMARY OF ARGUMENT

Three principal points are developed in the Argument. First, under the certificate provisions of Section 7(e) of the Act, the Commission is vested with a broad discretion in considering the various factors which constitute the public convenience and necessity. The Commission's June 24 order, granting the Producers certificates in accordance with their contracts and providing for a determination of the reasonableness of the proposed initial rates in appropriate Section 5(a) proceedings, reflects a proper exercise of this discretion which is adequately supported by substantial evidence. Second, a certificate applicant's refusal to accept a conditional certificate does not deprive the Commission of its statutory jurisdiction, on rehearing, to "change its mind" and issue an unconditional certificate. Thus, the Producers' refusal to accept certificates conditioned on an initial price lower than that stipulated in their contracts did not deprive the Commission of jurisdiction to reconsider their applications and grant them certificates in conformity with their contracts. Finally, the court below exceeded its expressly limited statutory authority by basing its decision on an objection raised *sua sponte*.

Although the Court of Appeals committed substantial error with respect to each of the foregoing points, the main thrust of its decision was a drive toward the imposition of an administrative policy requiring the Commission to determine the reasonableness of initial rates in certificate proceedings — an obvious attempt to substitute its own judgment for that of the Commission. Therefore, the fundamental issue in this case is a determination of the Commission's discretion in a certificate proceeding under Section 7 of the Natural Gas Act. This determination is governed by well-established principles of administrative law, the legis-

lative history of the Act, and the practical problems inherent in proper administration of the Act.

I

The plain language of the Natural Gas Act, its purpose and structure and pertinent legislative history, as well as the Commission's administrative construction of its function thereunder, all support the discretion of the Commission to issue a certificate in accordance with an applicant's contract while providing for a review of the initial rate in a Section 5(a) proceeding.

The Commission's June 24 order certificating the sales proposed by the Producers in accordance with their contracts was a proper exercise of its discretion to evaluate the various elements which comprise that intangible and elusive complex denominated "the public convenience and necessity" and then determine from an analysis of the total situation on which side of the controversy the public interest lies. The factors to be considered and the weight to be given those factors in determining whether an applicant has satisfied the statutory prerequisites are matters within the Commission's discretion, and its judgment will not be disturbed on appeal if supported by substantial evidence. Section 19(b), 52 Stat. 831 (1938), 15 U.S.C. 717r(b) (1952); *ICC* v. *Parker*, 326 U.S. 60, 65 (1945); *SEC* v. *Chenery Corporation*, 332 U.S. 194, 207 (1947); *United States* v. *Detroit & Cleveland Nav. Co.*, 326 U.S. 236, 241 (1945).

Reinforcement of the foregoing principles is found in the legislative history of the Act. As originally enacted, Section 7(c) contained an express statement of Congressional intent that natural gas shall be sold "at the lowest possible reasonable rate consistent with the maintenance of adequate serv-

ice in the public interest." The June 24 order would have met even this restrictive standard, for the Commission took express cognizance of both price and ability to serve. However, the Commission was given far more extensive discretion and control over certificates when Section 7 was amended in 1942 so as to confer broader powers on the Commission which did not limit it to any one criterion or group of criteria. H. Rep. No. 1290, 77th Cong., 1st sess., p. 2 (1941).

Further, in producer-certificate proceedings, the Commission has repeatedly made it clear that, although its determination of public convenience and necessity encompasses a consideration of the initial rate, this is only one of a number of aspects to be weighed. The extent to which and the manner in which consideration shall be accorded to the rate factor are matters charged to the Commission's expertise and discretion based upon the facts of each case.

The Commission's discretion in certificate proceedings is a matter of practical necessity. If the Commission is required in every certificate case to determine whether the proposed initial rate is "just and reasonable" within the meaning of Sections 4 and 5 of the Act, the supply of natural gas available to the interstate market will be severely limited because of the months, if not years, that will elapse before the Commission can determine whether the initial rate sought is justified. The burden on the Commission will become intolerable, and the additional delay between the date of the contract for the sale of natural gas in the interstate market and the time it is certificated will inevitably result in detriment to all parties concerned.

From the language of the Act and the decisions thereunder, it is evident that the Commission has a choice of remedies in treating problems respecting initial rates. As

in this case, the Commission may conclude that the public interest requires immediate issuance of a certificate and postpone determination of the reasonableness of the initial rate to appropriate proceedings under Section 5. Responsibility for selecting the means for achieving the statutory policy and the relation of remedy to policy are matters for the Commission's discretion. *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 112 (1946).

It is for the Commission, not the courts, to evaluate the requirements of public convenience and necessity. *Department of Conservation of Louisiana* v. *FPC*, 148 F. 2d 746 (5th Cir., 1945). This is what the Commission did in its June 24 order, and the benefit that will result to Tennessee and the consumers from an immediate certification of the proposed sales coupled with the uncontroverted evidence that the Producers are able and willing to render the proposed service, provide substantial evidence in support of the Commission's June 24 order.

II

With utter disregard for the Commission's June 24 order and the foregoing principles of administrative law, the Court of Appeals held that the Producers' refusal to accept rate-conditioned certificates deprived the Commission of its "statutory jurisdiction" to consider the certificate applications, and remanded the proceedings with directions to proceed in conformity with its view that the Commission "has left no doubt of the importance and necessity of a consideration of the reasonableness of the proposed initial rate" (R. 659). This the court below did despite the express Commission findings that the need to assure commitment of the gas reserves involved required issuance of certificates in accordance with the Producers' contracts,

and that the consuming public would be adequately protected by postponing inquiry into the reasonableness of the initial rates to proceedings under Section 5(a) (R. 487-488). While expressly recognizing the question of price, the Commission said that, on the facts here, "the precise charge that is made initially is less important than the assurance of this great supply of gas" (R. 487).

The opinion rendered by the court below proceeds upon a manifest misunderstanding of the certificate provisions of the Natural Gas Act and the procedures thereunder. In determining that the Commission lacked authority to reconsider the Producers' certificate applications, the court below erroneously assumed that a certificate applicant merely by filing its application thereby commits itself to undertake service under whatever certificate may issue. This misunderstanding is disclosed by the court's use of the word "threat" to characterize the Producers' refusal of the certificates proffered in the May 20 order. The fallacy inherent in the court's assumption is readily apparent. The court has completely ignored the function that privately negotiated contracts perform in the statutory scheme of regulation. An applicant for a certificate has no obligation or duty, legal or moral, to accept a certificate from the Commission which the applicant feels is unreasonable or otherwise unacceptable; and this is particularly true where, as in the present case, the contracts specifically provide that the certificate must be "satisfactory" to each of the parties. In essence, every applicant requests a certificate exactly as set forth in his application. In this case, it was to make the sales provided for in the Producers' contracts with Tennessee. In the light of *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956), how could the Producers' insistence on certificates in accordance with their contracts deprive the Commission of jurisdiction to

reconsider their applications when those very same contracts formed the basis for the Commission's jurisdiction? Furthermore, an applicant's right to accept or reject a certificate is contemplated by the Commission's regulation,[8] and the legislative history of the Act.

The Commission's authority to reconsider the Producers' applications was firmly established by Section 19(a) of the Act which empowers the Commission "to grant or deny rehearing and to abrogate or modify its orders without further hearing." If, upon reconsidering the certificate applications, the Commission decided to change its mind, it was authorized to do so. *Cia Mexicana de Gas* v. *FPC*, 167 F. 2d 804 (5th Cir., 1948); *National Coal Association* v. *FPC*, 247 F. 2d 86 (D.C. Cir., 1957).

The holding of the court below that the Producers' attempt to obtain certificates in accordance with the terms of their contracts with Tennessee divested the Commission of jurisdiction to reconsider their applications is a blow at the foundation of the regulatory scheme intended by Congress as interpreted in *Mobile*.

III

Reversal of the decision below is independently required because of a plain violation by the Court of Appeals of the express statutory limitation on its reviewing authority.

The court below rejected Respondents' contention that the Commission had abused its discretion. Instead, the court raised an objection not theretofore urged by any party and based its decision solely on a novel question as to whether the Commission had violated its "statutory jurisdiction." The court answered this question in the affirmative, holding

[8] 18 C.F.R. 157.20.

that the Commission lacked authority to consider an application "where the terms of the application limit the scope of the inquiry which the Commission is required to make for a determination of public convenience and necessity" (R. 658).

Section 19(b) of the Act expressly forbids such an approach, for it forecloses judicial consideration of any objection to a commission order "unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do."

This Court and various courts of appeals have strictly applied the foregoing limitation. A reviewing court may not resolve a case on objections raised *sua sponte*, even if it were to apply correct principles in reaching its result. *FPC* v. *Colorado Gas Company*, 348 U.S. 492 (1955). And this rule is applicable even where the issue is one involving the Commission's statutory jurisdiction. *American Power & Light Co.* v. *SEC*, 141 F. 2d 606 (1st Cir., 1944), aff'd, 329 U.S. 90 (1946).

ARGUMENT

The decision of the court below reversing the Commission's June 24 order raises grave questions as to the Commission's authority and discretion under Section 7 of the Natural Gas Act. In particular, the decision below brings into sharp focus questions as to the scope of the Commission's authority to consider a certificate applicant's proposal as submitted, and its administrative discretion to postpone determination of the reasonableness of the proposed initial contract price in order to assure satisfaction of the need for additional supplies of natural gas.

I

THE COMMISSION'S JUNE 24 ORDER WAS A PROPER EXERCISE OF ITS ADMINISTRATIVE DISCRETION WHICH IS SUPPORTED BY SUBSTANTIAL EVIDENCE.

1. Whether A Certificate Application Is in the Public Convenience and Necessity Is a Determination Entrusted to the Commission by Section 7 of the Natural Gas Act.

The Commission's power to grant or deny an application for a certificate of public convenience and necessity is contained in Section 7 of the Natural Gas Act.. Sections 7(c) and 7(e) require the natural gas company to take the initiative and submit its proposal[9]— in this case, the sale of natural gas by the Producers under the terms and provisions of their contracts. Pursuant to these sections of the Act, the Commission is required to issue a certificate if the applicant shows that he "is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder," and that such service "is or will be required by the present or future public convenience and necessity." The Producers' applications conformed to this statutory standard, and in its June 24 order, the Commission made both the requisite findings (R. 570). In reaching these conclusions, the Commission showed on the face of its order the considerations which led to its decision. The Commission stated:

[9] We do not understand any party to contend that the Producers did not fully comply with the terms of Section 7(d), dealing with the formal requirements for certificates, or with the Commission's Regulations thereunder. We deal later with the court's holding that the Producers were not willing to comply with the Commission's regulations (*infra*, pp. 33-34).

"In the present status of the case we are left with the difficult problem of how to assure the delivery of this gas to the large market served by Tennessee Gas, and at the same time protect the consumers from an unreasonably high price. In reaching a solution to this problem we are moved by the primary consideration that the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas. *Further, it appears to us, important as is the issue of price, that as far as the public is concerned, the precise charge that is made initially is less important than the assurance of this great supply of gas.* In view of these circumstances and the fact that the record does not show that the 21.4-cent rate is necessarily excessive, we agree with the presiding examiner that this certificate proceeding under Section 7 of the Natural Gas Act should not assume the character of a rate proceeding under Section 5(a). *We are of the opinion that, in the circumstances of this case, in view of the great demand for gas by customers of Tennessee Gas, the price consideration should not be made the prime determinant of what the public convenience and necessity require.* By virtue of the authority conferred upon us by Sections 4 and 5 of the Natural Gas Act and the proposal to modify the contracts made by the CATCO companies, we are of the opinion that we will be able to adequately protect the public interest with respect to the matter of price. In order, therefore, to insure that deliveries of gas by the four CATCO companies to Tennessee Gas will commence as promptly as possible, we will grant permanent certificates to them by this order without any condition affecting the initial price of 21.4 cents per Mcf" (R. 487; Italics supplied).

The June 24 order clearly demonstrates that the Commission was of the opinion that, so far as the public interest was concerned, the price initially charged for the Producers'

gas was of less importance than the assurance of the great supply of gas. In the exercise of its administrative discretion and expert judgment, the Commission simply found that in view of the great demand for gas by the customers of Tennessee, the price consideration should not be made the prime determinant of what the public convenience and necessity required (R. 487-488). To support its determination, the Commission noted that the record did not show that the 21.4 cent rate was necessarily excessive and that a certificate proceeding under Section 7 of the Natural Gas Act should not assume the character of a rate proceeding under Section 5(a) (R. 487).

The Commission's June 24 order was a proper exercise of its descretion to evaluate the various factors which make up the complex known as the "public convenience and necessity." Having exercised its discretion, the Commission's judgment cannot be disturbed by the reviewing court, absent a showing of abuse of discretion or want of support by substantial evidence.[10] Therefore, it is apparent that the function of the court below was to determine whether the Commission's June 24 order was supported by substantial evidence and not to substitute its judgment for that of the Commission.[11] The mere fact that the court below might have reached a different result would not justify a reversal of the Commission's expert judgment.[12]

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[10] *ICC* v. *Parker*, 326 U.S. 60, 65 (1945); *National Coal Association* v. *FPC*, 191 F. 2d 462, 467 (D.C. Cir., 1951); *Norfolk Southern Bus Corp.* v. *United States*, 96 F. Supp. 756, 761 (E.D. Va., 1950), aff'd, 340 U.S. 802 (1949); *Beard-Laney* v. *United States*, 83 F. Supp. 27, 32 (E.D.S.C. 1949), aff'd, 338 U.S. 803 (1949).

[11] Section 19(b), 52 Stat. 831 (1938), 15 U.S.C. 717r(b) (1952); Administrative Procedure Act, Section 10, Act of June 11, 1946, 60 Stat. 243, 5 U.S.C. 1009 (1952); *SEC* v. *Chenery Corporation*, 332 U.S. 194, 207 (1947); *Willapoint Oysters, Inc.* v. *Ewing*, 174 F. 2d 676 (9th Cir., 1949), cert. den., 338 U.S. 860 (1949).

[12] *United States* v. *Detroit & Cleveland Nav. Co.*, 326 U.S. 236, 241 (1945); *Department of Conservation of Louisiana* v. *FPC*, 148 F. 2d 746, 750 (5th Cir., 1945); *Charleston & Western Caroline Ry.* v. *FPC*, 234 F. 2d 62, 64 (D.C. Cir., 1956).

For if the courts could thus substitute their judgment for the administrative expertise, it would inevitably emasculate the Commission's discretion under the Natural Gas Act and would create an open invitation to administrative chaos.

Even the court below recognized that it is for the Commission, and not the courts, to determine when a certificate of public convenience and necessity should issue, stating (R. 661):

> "The Act entrusts to the Commission, and to the Commission alone, the power and authority to determine the issue of public convenience and necessity. Within the framework of the Natural Gas Act, the Commission alone is entrusted with determining the scope of its inquiry necessary to arrive at the decision of whether to certificate a special sale."

Despite this recognition of the Commission's discretion, the court below would require the Commission, in a Section 7 certificate proceeding, to make a formal determination of whether the proposed initial price is "just and reasonable" under the standards provided in Sections 4 and 5 of the Act. The fallacy inherent in this argument is simply that there is nothing in the Act to require the Commission to make the initial price the prime determinant in resolving the complex of factors it considers in determining the public convenience and necessity. The factors to be considered and the weight to be given to those factors are matters to be determined by the Commission in the exercise of its expert judgment.

The June 24 order clearly evidences that the initial price was one of the factors considered by the Commission in determining that the issuance of a certificate to Producers in accordance with the terms of their contract was required by the public convenience and necessity. The Commission

considered the price factor along with many others, but decided not to make the price the prime determinant nor to convert this certificate proceeding into a formal rate case. In view of all of the circumstances the Commission determined that the public interest would be adequately protected by a review of the initial rates in Section 5(a) proceedings. This was a proper exercise of the Commission's administrative discretion which is sustained by the legislative history of the Natural Gas Act, prior Commission interpretations of its function under Section 7 of the Act, judicial precedent and the exigencies inherent in a proper administration of the Act.

a. *Legislative History.*

As originally enacted in 1938, Section 7 had no provision directly comparable to Section 7(e). Section 7(c) then gave the Commission authority to issue certificates only where it was proposed to render service in an area already being served by another natural gas company. The original Section 7(c) provided:

> "(c) No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extensions thereof; *Provided, however,* That a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying increased market demands in the territory in which it operates.

> Whenever any natural-gas company shall make application for a certificate of convenience and necessity under the provisions of this subsection, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission. In passing on applications for certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest."

It is noteworthy that, in the concluding directory language expressing the intent of Congress that natural gas should be sold at the "lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest," the Commission was admonished to weigh not only the effect of the rate but also the maintenance of adequate service. Even under this narrow and particularized definition of legislative intent, the June 24 order would be unassailable. For the Commission took express cognizance of both price and ability to serve, concluding finally that the latter would suffer through loss of the reserves, if price were to be emphasized to the exclusion of supply considerations (R. 487).

In 1942, Section 7 was amended to provide the Commission with more extensive certificate control over the transportation and sale of natural gas subject to its jurisdiction. The standards provided by the original Section 7(c) had proven unwieldy in practice.[13] Significantly, the concluding

[13] H. Rep. No. 1290, 77th Cong., 1st sess., pp. 2-3 (1941).

directory provision contained in the original Section 7(c) was deleted, and that restrictive language was replaced by the discretionary authority vested in the Commission by Section 7(e), which confers a broad power on the Commission to scrutinize all aspects of any proposed service. Section 7(e) does not limit the Commission's consideration to any one criterion, or group of criteria.[14] The proper determination and evaluation of the factors constituting the public convenience and necessity were left to the expert judgment of the Commission.

Congress intended for the Commission, not the courts, to delineate the components of public convenience and necessity and to supply its expertise in determining how that standard shall be met in an individual case. The June 24 order rests on the Commission's express conclusion that assurance of supply required postponement of determination of the reasonableness of the initial rate. In holding to the contrary, the court below invaded the province which the legislative history shows Congress intended should be left exclusively to the Commission.

b. *Prior Commission Interpretation and Judicial Precedent.*

Consistent with the broad grant of power under Section 7(e), the Commission has, in practice, asserted discretionary authority in defining the components of public convenience and necessity. Both before and after the 1942 amendment, it resolved the issue of public convenience and necessity by weighing a complex of factors which it enumerated and evaluated.

Whether or not the Commission elects in its discretion to go into the reasonableness of the initial rate in a certifi-

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[14] H. Rep. No. 1290, 77th Cong., 1st sess., p. 2 (1941); Sen. Rep. No. 948, 77th Cong., 2nd sess. (1941), adopting the entirety of the House Report.

cate proceeding, the point is that there is no mandate requiring it to do so.[15] It is for the Commission to say, on a given set of facts, how much importance shall attach to the rate aspect in relation to the other factors which, in the opinion of the Commission, should be considered. *Baltimore & O. R. Co.* v. *United States*, 298 U.S. 349, 358-359 (1936). Often, certificate orders have merely contained a "boiler-plate" provision that they shall not be construed as a waiver of the requirements of Section 4 of the Act and are without prejudice to any findings or orders which have been or may thereafter be made by the Commission in a proceeding pending or thereafter instituted by or against the applicant.[16]

In producer certificate proceedings, the Commission repeatedly has made it clear that, although its determination of the public convenience and necessity encompasses a consideration of the initial contract price, the rate aspect of a producer applicant's proposal is only one of a number of factors to be weighed in the scales of public convenience and necessity. Thus, in denying rehearing in the *Tamborello* case,[17] early in its regulation of producers, the Commission rejected a contention that a proposed sale cannot be held to be required by the public convenience and necessity unless the initial contract rate is found to be "just and reasonable" (15 F.P.C. at 2-3):

> "The Natural Gas Act does not require that each producer-applicant must establish as an indispensable prerequisite to the grant of a certificate of public convenience and necessity to sell natural gas in interstate commerce for resale that the price, terms and condi-

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[15] *Florida Economic Advisory Council* v. *FPC*, 251 F. 2d 643, 646 (D.C. Cir., 1957), cert. den., 356 U.S. 959 (1958); *Oklahoma Natural Gas Co.* v. *FPC*, 257 F. 2d 634 (D.C. Cir., 1958), No. 288, October Term, 1958, pet. for cert. dismissed pursuant to petitioner's motion.

[16] The order under review here contained such a provision (R. 492).

[17] *Re Anthony J. Tamborello, et al.*, 15 F.P.C. 1 (1956).

tions under which such sale shall be consummated shall be the lowest reasonable rate. See *In the Matter of The Atlantic Refining Company*, docket No. G-8809, presiding examiner's decision affirmed December 29, 1955.

"We reaffirm our holding in the order denying rehearing *In the Matters of Cities Service Gas Company and Signal Oil and Gas Company*, docket Nos. G-2569 and G-2570, issued January 15, 1956, that

> 'The rate we deem proper to be charged if a certificate should issue is not necessarily the same we could find to be the lowest reasonable rate under Section 5. Criteria for prescribing a rate necessarily differ from criteria for proscribing a rate.'

"Adoption of the contentions of applicants for rehearing would require that prior to issuance of any certificate of public convenience and necessity authorizing the sale of natural gas in interstate commerce for resale we enter upon the equivalent of a complete Section 5 investigation and, on the basis of the evidence adduced, determine the 'lowest reasonable rate'. The rate so determined would then be imposed by a condition attached to the certificate. Such holding would not only be contrary to the plain language of the act but would also prevent us from exercising the judgment and discretion delegated to us by Congress. Reasonable regulation of natural gas companies, whether interstate pipeline transmission companies or independent producers, requires that our decisions and determinations be the result of a conscientious appraisal of evidence adduced, having regard for the interest of all who may be affected thereby and our determination of the requirements of public convenience and necessity in the circumstances."

In numerous other producer certificate proceedings, the Commission has expressed its judgment that the public interest requires immediate certification to assure maintenance of adequate service and has deferred review of the

initial rates for later proceedings under Section 5.[18] The Commission's long standing interpretation of its function in a Section 7 certificate proceeding and its consistent administration concretely support its June 24 order and are entitled to great weight by the Court in reviewing the validity of that order.[19]

In producer certificate proceedings, the Commission exercises its discretion in light of the particular facts confronting it. An example of this inherent administrative flexibilty is the *Signal* case,[20] decided the same day as *Tamborello*. Because of the circumstances peculiar to the *Signal* record, the Commission attached a condition to the certificate reducing the initial rate from 12 cents per Mcf to 10 cents per Mcf. The rate condition was imposed because the initial contract price of 12 cents per Mcf would "cause economic disruption in a considerable area" (15 F.P.C. at 1021) and because Signal "failed effectively to challenge either the evidence attacking its proposed rate or the evidence supporting the 10-cent rate" (12 P.U.R. 3d at 16).

Assuming *arguendo* that the Commission could properly attach a rate-reducing condition in the *Signal* case, the

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[18] *Re The Atlantic Refining Company, et al.*, Docket Nos. G-8809, et al., order issued December 30, 1955; *Re Alfred C. Glassell, Jr., et al.*, Docket Nos. G-11190, et al., order issued October 18, 1957; *Re Texas Gas Transmission Corporation, et al.*, Docket Nos. G-11965, et al., order issued October 18, 1957; *Re United Gas Pipe Line Company, et al.*, Docket Nos. G-12416, et al., order issued October 29, 1957; *Re Seaboard Oil Company, Operator, et al.*, 19 F.P.C. 416 (1958); *Re Southern Natural Gas Company, et al.*, Docket Nos. G-13864, et al., order issued March 31, 1958; *Re Texas Eastern Transmission Corporation, et al.*, Docket Nos. G-12446, et al., Examiner's Decision issued April 15, 1958; *Re Southern Natural Gas Company et al.*, Docket Nos. G-13082, et al., order issued April 18, 1958; *Re Sunray Mid-Continent Oil Company, et al.*, 19 F.P.C. 618 (1958); *Re The Superior Oil Company et al.*, 19 F.P.C. 637 (1958); *Re United Gas Pipe Line Company, et al.*, 19 F.P.C. 931 (1958); *Re Texas Gas Transmission Corporation, et al.*, Docket Nos. C-14494, et al., order issued August 5, 1958; *Re Transcontinental Gas Pipe Line, Corporation, et al.*, 20 F.P.C. 264 (1958).

[19] *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933); *United States* v. *American Trucking Ass'ns.*, 310 U.S. 534, 549 (1940).

[20] *Re Cities Service Gas Company, et al.*, 14 F.P.C. ____, 12 P.U.R. 3d 3, reh. den., 15 F.P.C. 1020 (1955), aff'd, sub. nom., *Signal Oil and Gas Company* v. *FPC*, 238 F. 2d 771, cert. den., 353 U.S. 923 (1956).

rationale of that decision has no application to the present case where the uncontroverted evidence shows that the proposed sales are not in any of Tennessee's Louisiana pricing districts and will not cause economic disruption of existing price structures or "trigger" favored-nation or price-redetermination clauses in other contracts (R. 43, 148-159).

Further, it should be noted that in *Signal* the Commission clearly indicated that it was not determining the reasonableness of the 10-cent rate, stating (12 P.U.R. 3d 16):

> "We wish clearly to state that in conditioning the order to follow to provide for a rate of 10 cents per Mcf, we do not find that this rate is the just and reasonable rate within the meaning of section 4 of the Act."

It merely held that a "vital element" of public convenience and necessity is "concerned with the rates proposed" (12 P.U.R. 3d at 14). This significant facet of the *Signal* opinion was entirely misunderstood by the court below for it plainly erred in saying (R. 658-659):

> "When the Signal Oil case was before the Commission, it said that the *justness and the reasonableness of the rate* was a 'vital element' in demonstrating 'that the service proposed is or will be required by the present or future public convenience and necessity.' Cities Service Gas Co., et al., 12 P.U.R. 3d 3, 14 (1955)." (Italics supplied.)

As quoted above, the Commission emphasized in *Tamborello* the necessity for a "conscientious appraisal of the evidence" in determining what disposition of a certificate case is required in the public interest. Application of that principle to the facts in this case required the conclusion reached by the Commission in its June 24 order.

c. *Proper Administration of the Act.*

The practical problems involved in the administration of the Natural Gas Act require that the Commission be

given a broad discretion in determining whether a certificate application is in the public convenience and necessity. If independent producer certificate cases are required to be turned into rate cases where the Commission must determine whether the proposed initial rate is "just and reasonable" under the standards provided in Sections 4 and 5 of the Act, it will be utterly impossible for the Commission to administer the Act.[21] If such a burden is imposed upon the Commission, the supply of natural gas available to the interstate market will be severely limited because of the months, if not years, that will elapse before the Commission can determine whether each and every initial rate is justified.

The Commission has not yet formulated any definitive or workable standards for determining whether a producer's contract price meets the just and reasonable standards of the Act. Neither the Commission nor the producers know what criteria of proof is required. *Forest Oil Corp.* v. *FPC*, (5th Cir., decided February 20, 1959). Compounding the complexities already inherent in a Section 7 certificate proceeding with the so far insoluble difficulties of a rate proceeding will completely disrupt and delay the Commission's attempt to devise a workable regulatory pattern. The burden on the Commission will become intolerable, and the

[21] In 1958, 1,601 certificate applications were filed by independent producers, whereas a total of 1,395 were disposed of during the year. This leaves 2,024 certificate applications pending at the end of the year compared with 1,818 on hand a year earlier. Since June 7, 1954, 10,761 certificate applications have been filed and 8,737 have been disposed of, most of these in uncontested proceedings. On the other hand, during the year 1958, independent producers filed 1,939 rate increases. Of this amount, the Commission suspended 1,064. By comparison, there were 2,330 rate increases filed in 1957, of which 717 were suspended. At the end of 1958, the Commission had pending 2,034 increases. This compared with 1,040 increases which were pending at the end of 1957. At the end of 1956, there were only 358 suspensions pending. In addition to the 1,064 new suspensions issued in 1958, 16 other cases which the Commission had previously disposed of were remanded by the courts in 1958, leaving on hand 2,021 rate increase cases. On the other hand, during 1958, the Commission disposed of only 56 rate increases. FPC Press Release No. 10183, issued December 8, 1958.

additional delay between the time a contract for the sale of natural gas in the interstate market is executed and the time it is certificated will inevitably result to the detriment of all parties concerned, and the additional supplies of natural gas which the consuming public so vitally needs will be reduced to a mere trickle.[22]

It is evident that where the reasonableness of the proposed initial price is brought into issue, the Commission has a choice of remedies under the Act. In this case, the Commission decided to issue the certificate in accordance with the applicant's contract and determine the reasonableness of the initial rate in appropriate proceedings under Section 5 of the Act. This was a proper exercise of the Commission's discretion because responsibility for selecting the means of achieving the statutory policy and the relation of the remedy to that policy are matters peculiarly within the Commission's discretion and should not be disturbed by the courts on appeal. *American Power & Light Co.* v. *SEC*, 329 U.S. 90 (1946); *Phelps Dodge Corporation* v. *NLRB*, 313 U.S. 177, 194 (1941); *General Protective Com.* v. *SEC*, 346 U.S. 521, 534 (1954).

2. The Commission's June 24 Order Is Supported by Substantial Evidence.

The Commission's June 24 order is predicated upon its determination that "in view of the great demand for gas by customers of Tennessee Gas, the price consideration should not be made the prime determinant of what the public convenience and necessity require" (R. 487). In this

[22] It is significant to note that the Commission has not yet completed its investigation as to the reasonableness of the natural gas rates of Phillips Petroleum Co. In fact, the matter is still pending before the Presiding Examiner. Docket Nos. G-1148, et al. The Court will recall that this proceeding was the basis for its decision in *Phillips Petroleum Co.* v. *State of Wisconsin*, 347 U.S. 672 (1954).

regard it is significant to note that the need for this gas is uncontroverted. The numerous certificates previously issued to Tennessee leave no doubt as to its ever-present need for additional supplies of gas to satisfy the insatiable demands of its ever-expanding market.[23] The Commission could not properly ignore the increasing consumption of gas by Tennessee's present customers and the many thousands of additional consumers in the areas served by Tennessee that will be served as a result of this purchase (R. 487). In fact, as indicated by this Court, concern for the ultimate consumer is a primary consideration under the Natural Gas Act.[24]

Nor can the advantages to Tennessee, and thus to the ultimate consumers, that will result from the certification of the proposed sales be overlooked. Summarized, these advantages are (R. 46-47, 250-251):

(1) A good location with respect to Tennessee's main transmission system;

(2) A large amount of gas reserves proven at the time of negotiation (1,673,929,000,000 cubic feet of natural gas have been proven on 11,500 of the 95,000 dedicated acres);

(3) A great potential for additional reserves within the dedicated acreage, which will be available to Tennessee in the future;

(4) An entry afforded into other vast areas of prolific offshore reserves, thereby placing Tennessee in a favorable position to acquire additional reserves developed in the future and enabling it thereby to continue to meet the expanding demands of its customers; and

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[23] Tennessee serves customers in the states of Tennessee, Ohio, Pennsylvania, New York, Massachusetts and other New England states. The growth in the consumption of natural gas in those states during recent years has been tremendous and it is expected to increase in the future.

[24] *FPC* v. *Interstate Natural Gas Co.*, 336 U.S. 577, 581 (1949); *Phillips Petroleum Co.* v. *State of Wisconsin*, 347 U.S. 672 (1954); *FPC* v. *Hope Natural Gas Co.*, 320 U.S. 591 (1944).

(5) Acquisition of reserves which constituted the only large gas reserve for sale at that time in the Gulf Coast area.

The impact of these factors on Tennessee's ability to continue to meet the need of its ultimate consumers clearly indicates that the proposed sales were required by the public convenience and necessity. The June 24 order reflects an exercise of the Commission's function not only to appraise the facts and draw inferences from them, but also to bring to bear upon the problem an expert judgment and to determine from an analysis of the total situation on which side of the controversy the public interest lies. *United States* v. *Detroit & Cleveland Nav. Co.*, 326 U.S. 236, 241 (1945).

The Commission's decision not to make price the prime determinant is further supported by the fact that there have been no other sales of gas in West Cameron, East Cameron or Vermilion offshore areas prior to this sale (R. 43-44). In fact, there is no evidence of any offshore sale within 200 miles of any lease involved in these proceedings (R. 58). Since these leases are not in any of Tennessee's Louisiana pricing districts, the proposed sales will not cause economic disruption of existing price structures and will not "trigger" favored-nation or price-redetermination clauses in other contracts (R. 43, 148-159). Nor will the proposed price cause Tennessee to request an increase in its rates (R. 202).

An applicant under Section 7(e) of the Act who shows that he is able and willing to perform the service proposed and that such service is or will be required by the present or future public convenience and necessity is entitled to a certificate as a matter or right. The record in this case firmly establishes without dispute that the Producers are ready and willing to perform their obligations under their contracts with Tennessee. The Produc-

ers have dedicated leases covering over 95,000 acres to the performance of their contracts with Tennessee, and although only 12 per cent of this dedicated acreage has been developed, the already proven recoverable reserves are 1.673 trillion cubic feet (R. 143). At the time of hearing, 22 gas wells had been completed in water as deep as 90 feet, and 11 additional wells were programmed for the balance of 1957 (R. 25). The full extent of this prolific gas reserve has not yet been determined, but the 12 per cent of the leases which has been developed represented the largest single sale of gas available on the Gulf Coast and will constitute 11 per cent of the total gas supply of Tennessee (R. 41, 139-140). The evidence further showed that each of the Producers was financially and technically able to do all things necessary to perform their obligations (R. 27-29). These uncontroverted facts clearly demonstrate that the Producers met the prerequisites prescribed in Section 7 of the Act and the Commission properly granted them certificates pursuant to their contracts with Tennessee (R. 570-571).

The Commission has recently summarized what it considers to be the requirements for a *prima facie* case by an independent producer in a certificate proceeding as follows:

> "We are of the view that if the applicant proves there is a market for the gas at the proposed price and that the project is economically feasible at the proposed price (both market and economic feasibility being factors which we consider in determining public convenience and necessity) that it has sustained its burden of going forward with the evidence, and in the absence of evidence showing that the proposed price or rate adversely affect the public convenience and necessity, the applicant has made out a *prima facie* case, and a certificate should issue to it."[25]

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[25] *Re Hope Natural Gas Company*, Docket No. G-12571, issued March 31, 1958.

Here, there is no question that there is a market for the Producers' gas and that the project is economically feasible at the initial price. There was introduced no evidence of any kind showing that such price would adversely affect the public convenience and necessity. On the contrary, the record discloses that no other contract prices will be affected and that Tennessee will not be required to seek a rate increase (R. 43, 202). Accordingly, the Producers have established a *prima facie* case, and the foregoing evidence forms substantial support for the Commission's June 24 certification of the sales proposed by the Producers. It was incumbent upon the court below to sustain this proper exercise of the Commission's discretion.[26]

II

THE PRODUCERS' REFUSAL TO ACCEPT CONDITIONAL CERTIFICATES DID NOT DEPRIVE THE COMMISSION OF AUTHORITY, ON REHEARING, TO ISSUE UNCONDITIONAL CERTIFICATES.

1. The Producers Had the Contractual and Statutory Right To Reject the Conditional Certificates Contained in the May 20 Order.

Respondents argued below that the June 24 order constituted an abuse of discretion by the Commission because the Commission had concluded in its earlier orders of April 22 and May 20 that the record did "not contain sufficient evidence on which to base a finding that the public convenience and necessity requires the sale of the gas" at the contract rate level. They attributed the difference between

[26] Section 19(b), 52 Stat. 831 (1938), 15 U.S.C. 717r(b) (1952); Administrative Procedure Act, Section 10, Act of June 11, 1946, 60 Stat. 243, 5 U.S.C. 1009 (1952); *SEC* v. *Chenery Corporation*, 332 U.S. 194, 207 (1947); *ICC* v. *Parker*, 326 U.S. 60, 65 (1945).

the May 20 order and the final order to the Commission's submission to the so-called "threats" of the Producers to withhold their gas from the interstate market unless they received their initial contract price. Respondents urged that the Commission should attach a rate reducing condition to any certificate issued to the Producers, suggesting a wide variety of initial prices, reasons and conditions.[27]

The court below expressly rejected the formulation of issues presented by Respondents and substituted a new objection of its own, not theretofore urged by any party, saying (R. 658):

> "* * * We conceive of the question, however, as a more fundamental one, involving the statutory jurisdiction of the Federal Power Commission. It is whether the Commission has authority to consider an application for a certificate under Section 7(c) where the terms of the application limit the scope of the inquiry which the Commission is required to make for a determination of public convenience and necessity."

In support of its conclusion that the Commission did not have statutory authority to consider the Producers' applications, the court relied upon statements by the Commission in its earlier orders of April 22 and May 20 that the

[27] It was contended that the Commission should investigate the initial rates to determine whether they were "within the ball park" (Long Island Lighting Br. 12, 16), or that the rates are "within reasonable range of a 'just and reasonable' price" (id. 13), or that "an inquiry should be made 'at least if the price appears to be out of line'" (id. 13-14). PSC claimed that the Commission should have attached a condition reducing the initial rate "to a level which would be without deleterious effect upon the interstate market, the interstate pipelines, and, through them, the ultimate interstate consumers" (PSC Br. 19). Public Service suggested that the Commission should require a showing that "the contracted rate level or price was required or needed by the applicants" (Public Service Br. 5). It argued further that the Commission should require applicants to present evidence of "operating expense, capital costs or profits" or that the contract rate is "necessary to insure confidence in their financial integrity or to maintain credit or attract capital" (id. 11). At best, these arguments constitute no more than claims for an exercise of Commission discretion different from that which it found to be required by the public convenience and necessity.

record contained insufficient evidence on which to base a finding that the sale at the contract rate would be in the public interest (R. 659-660). From this, the court concluded that decisions by the Producers not to accept the certificates tendered in the May 20 order constituted "threats" which limited the scope of the Commission's inquiry and deprived it of jurisdiction to consider further the Producers' applications.

A "threat" is an "expression of an intention to inflict loss or harm on another by *illegal* means" (italics supplied).[28] Connotations adverse to the Producers thus result from the repeated misuse by the court below of the term "threat" (R. 657, 660) to describe the undeniable *legal* right of the Producers to commit, or decline to commit, their reserves to interstate service under a proffered certificate.[29] This misunderstanding by the court, which is basic to its decision, is a misconception that Section 7 of the Act requires an applicant to agree in advance to accept any certificate which might be issued to it.

The applications of the Producers contained no unusual provisions or conditions, and followed the requirements of the Commission's regulations.[30] In conformity with these regulations, copies of the contract of each Producer were attached to the various applications (R. 19-21). Each contract provided that certificates of public convenience and necessity *satisfactory* to both the Producers and to Tennessee must be received, or the contracts were subject to cancellation (R. 28, 287-288). Such provisions are cus-

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[28] Webster's New International Dictionary, 2nd ed., G. & C. Merriam Company (1955).

[29] For example, the court said (R. 660):

"It was only after the threat of withholding the gas from interstate market that the Commission retreated from its previous position and granted the certificates without rate conditions by its order of June 24, 1957."

[30] 18 C.F.R. 157.24-157.25.

tomary in gas purchase contracts. The Producers, in refusing to accept the May 20 order, did no more than exercise the right given them under their contracts to refuse to accept an unsatisfactory certificate. Furthermore, such right of rejection is recognized in the Commission's regulations.[31] Indeed, each of the orders issued by the Commission in this proceeding contains clauses providing for acceptance thereof by the Producers (R. 489, 608, 617). Their refusal to accept an unsatisfactory certificate could not oust the Commission of jurisdiction to consider the matter further.

A request for a certificate which simply allows a producer to carry out the terms and provisions of his contract, including the initial rate at the level provided for in such contract, is in accordance with the plain provisions of the Natural Gas Act and in no sense ousts the Commission of jurisdiction to consider further the certificate application. Under the Natural Gas Act, all rates are established originally by private parties, and the Commission's sole function is to review these rates. This dichotomy between the rate-setting and rate-reviewing powers of the Commission was firmly established in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), where Mr. Justice Harlan, speaking for the Court, said:

> "In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts. In this respect, the Act is in marked contrast to the Interstate Commerce Act, which in effect precludes private rate agreements by its requirements that the rates to all shippers be made

[31] 18 C.F.R. 157.20.

uniform, a requirement which made unnecessary any provision for filing contracts. * * * Recognizing the need these circumstances create for individualized arrangements between natural gas companies and distributors, the Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public.

* * *

"* * * Moreover, the very premise that Sections 4(d) and (e) and 5(a) are alternatively rate-changing 'procedures' is itself based on a misconception of the structure of the Act. These sections are simply parts of a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all rates are subject to being modified by the Commission upon a finding that they are unlawful. The Act merely defines the review powers of the Commission and imposes such duties on natural gas companies as are necessary to effectuate those powers; it purports neither to grant nor to define the initial rate-setting powers of natural gas companies.

"The powers of the Commission are defined by Sections 4(e) and 5(a). The basic power of the Commission is that given it by Section 5(a) to set aside and modify any rate or contract which it determines, after hearing, to be 'unjust, unreasonable, unduly discriminatory, or preferential'. This is neither a 'rate-making' nor a 'rate-changing' procedure. It is simply the power to review rates and contracts made in the first instance by natural gas companies and, if they are determined to be unlawful, to remedy them.

* * *

"* * * In short, the Act provides no 'procedure' either for making or changing rates; it provides only for

notice to the Commission of the rates established by natural gas companies and for *review* by the Commission of those rates. The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act.

"All of the relevant provisions of the Act can thus be fully explained as simply defining and implementing the powers of the Commission to review rates set initially by natural gas companies, and there is nothing to indicate that they were intended to do more. Admittedly, the Act presumes a capacity in natural gas companies to make rates and contracts and to change them from time to time, but nowhere in the act is either power defined. The obvious implication is that, except as specifically limited by the Act, the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act: to establish ex parte, and change at will the rates offered to prospective customers; or to fix by contract, and change only by mutual agreement, the rate agreed upon with a particular customer."

Mobile concretely establishes that under the Natural Gas Act the initial "rate-setting powers" remain vested in private parties and that the Commission's sole function is to review the rates set in the first instance by such parties. The Commission's review function was recently reaffirmed in *United Gas Co.* v. *Memphis Gas Div.*, 358 U.S. 103 (1958), where Mr. Justice Harlan, again speaking for the Court, stated:

"Thus, Mobile, properly understood, affirmatively establishes United's right to proceed under Section 4 in the circumstances of this case. As we there said, 'the initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act.' 350 U.S. at 343."

Here, all that the Producers did was to refuse to accept proffered certificates which would have deprived them of their initial rate-setting powers. The Producers had the undeniable legal right to accept or reject the certificates, and there is nothing in the Act that requires an applicant to agree in advance to accept any certificate which might be issued to it.

The rate-changing powers of the Commission are contained in Sections 4 and 5 of the Act. After a hearing conducted under the auspices of either of these sections, the Commission can change a rate established by the parties. The Commission properly recognized this in its June 24 order by relegating the determination of the reasonableness of the Producers' rates to a Section 5 proceeding.

As noted above, Section 7 of the Act delineates the Commission's functions with respect to certificate applications. It is true that Section 7(e) grants the Commission authority to attach "reasonable conditions." However, if that authority be employed in an effort to impose a Commission-determined rate so as to force an applicant to undertake the sale at the Commission-fixed price, there is an undeniable collision with the limitations on the Commission's rate powers as detailed in *Mobile*. Yet that is precisely the effect of the decision below. Clearly, the imposition of a rate condition which an applicant is required to accept is beyond the power of the Commission under Section 7. In this manner the Act can be construed as a single statutory scheme of regulation which affords a reasonable accommodation between the conflicting interests of contract stability on the one hand and public regulation on the other, and Sections 4, 5 and 7 of the Act are reconciled so as to produce a symmetrical whole. *FPC* v. *Panhandle E. P. L. Co.*, 337 U.S. 498, 514 (1949); *Panhandle Eastern Pipe Line Co.*

v. *FPC*, 204 F. 2d 675 (3rd Cir., 1953); *Central West Utility Co.* v. *FPC*, 247 F. 2d 306, 313 (3rd Cir., 1957).

An applicant's right to reject a conditional certificate is reinforced by the legislative history of the Act, which shows that it was anticipated that an applicant might either reject a tendered certificate or apply for rehearing because of a condition it deemed unduly burdensome. Commissioner Manly, testifying with respect to the 1942 amendment of Section 7, stated:[32]

> "*Commissioner Manly* * * * Now, what the Commission does under ordinary conditions is to require those conditions to be set forth in the authorization for a certificate that is accepted by the company as a condition precedent to the actual issuance of the certificate, so that in all intents and purposes the company has a right to reject a certificate containing any conditions which are unreasonable, onerous, or have no relevancy to the issue.
>
> "*Mr. South*: That is what I have in mind. If they are too burdensome, then the application could be withdrawn.
>
> "*Commissioner Manly*. They could come back before the Commission and ask for a rehearing if they regard the terms and conditions as being onerous."

It cannot be said, as the court below put it, that the Producers' request for certificates conforming to their contracts implied a "condition" to their applications "requiring the Commission to forego consideration of an element which may be necessary in the formulation of its judgment" (R. 662). For such a request does no more than present the nature of the proposal of the Producers to be weighed

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[32] Hearings before the House Committee on Interstate and Foreign Commerce on H. Rep. No. 5429, 77th Cong., 1st sess., p. 23 (1941).

by the Commission against the totality of the requirements of public convenience and necessity. In addition, even if this were not so, the court below erred in supposing that a conditional application could "limit" the statutory jurisdiction of the Commission. Cf. *Sunray Mid-Continent Oil Company* v. *FPC*, 239 F. 2d 97 (10th Cir., 1956), rev'd on other grounds, 353 U.S. 944 (1957). The Producers' request for a certificate allowing them to carry out the terms and provisions of their contracts and to approve the initial rate at the level provided for in the contract, in no sense ousted the Commission's jurisdiction to consider the proposal. Nor did it in any way limit the Commission's inquiry into the price aspects of the proposal, along with other elements entering into the complex of public convenience and necessity.

2. The Commission Had the Authority To "Change Its Mind."

Obviously, on rehearing, the Commission had the authority to change its mind and issue the order of June 24. The lower court could not properly concern itself with alleged inconsistent findings made in the prior orders of April 22 and May 20. *Virginia Ry. Co.* v. *U. S.*, 272 U.S. 658, 665-666 (1926). Section 19(a) of the Act confers the right to seek rehearing of a final order of the Commission. It not only authorizes application for rehearing, but empowers the Commission "to grant or deny rehearing or to abrogate or modify its order without further hearing."[33] Without this power, of course, the granting of a rehearing would be an empty gesture. Manifestly, Section 19(a) contemplates the possibility of the reaching of a different result without additional evidence. On rehearing, if the Commis-

[33] 52 Stat. 821 (1938), 15 U.S.C. 717r(a) (1952).

sion does change its mind, the reviewing court must concern itself solely with the question of whether the final order under review is supported by substantial evidence. Thus, in *Cia Mexicana de Gas* v. *FPC*, 167 F. 2d 804 (5th Cir., 1948), the court considered a Commission order granting an export permit, which order reversed, after rehearing, a prior order denying such permit. Upholding the Commission's final order, the court stated (167 F. 2d at 806):

> "The fact, of which petitioners seek to make so much, that on the first hearing the Commission, two commissioners dissenting, refused the permit, and on the second hearing, without substantial additional evidence, granted it, is, we think, without significance here. A commission, like a court, may, indeed should, change its findings and order if on rehearing it is of a different mind. If it does so change, our function on a review of its findings and order is to determine not which of the two findings and orders was the best but whether, as claimed by petitioners, the findings and order under review are without evidence to support them."

A similar result was reached in *National Coal Association* v. *FPC*, 247 F. 2d 86 (D.C. Cir., 1957), where the court upheld a Commission order which without additional evidence reversed an earlier order issued in the same proceeding. The court stated (247 F. 2d at 88):

> "Since the order under review was based on findings sustained by evidence, and since we perceive no procedural error prejudicial to petitioners, we are not authorized to interfere with the Commission's evaluation of the public interest, the making of which is committed to its judgment."

This same rationale applies with full force here. It is immaterial that the Commission changed its mind in eval-

nating the public interest—a function committed to its judgment. Moreover, a Commission order is presumptively valid, and the Commission will be presumed to have properly performed its official duties. *Baltimore & O. R. Co.* v. *United States*, 298 U.S. 349, 358-359 (1936).

The court below recognized that the Commission had the authority "to change its mind"[34] but held that the June 24 order was not a proper exercise of this authority because: (1) the Commission dispensed with the consideration of the price element;[35] (2) conditions attached to the Producers' certificate applications limited the Commission's inquiry; and (3) the Producers were unwilling to conform to the conditions of the Act.[36] In so holding, the court has disregarded the plain language of the June 24 order, the content of the Producers' certificate applications and the uncontroverted evidence in the record.

First, the June 24 order clearly reflects that the element of price was thoroughly considered by the Commission in reaching its final decision. Significantly, the court below does not even mention the extensive discussion of the initial price contained in the June 24 order (R. 568-570), but

[34] The court stated (R. 661):

"Since in its first two orders the Commission determined that the record lacked sufficient evidence upon which to base a finding that the sale at the proposed rate would be in the public interest, and as the final order was based upon the same record, there is still insufficient evidence to support such a necessary finding."

[35] The court averted to the Commission's authority to consider price and then said (R. 662):

"In the present case, that the initial rate was a necessary consideration in the scope of inquiry into the determination of public convenience and necessity has been twice recognized by the Commission, even to the extent that its order of May 20, 1957, in fact conditioned the permanent certificates upon a contract amendment as to the initial price."

[36] In direct controvention of the Commission's formal findings (R. 489), which are unchallenged and binding because supported by substantial evidence, the court below stated (R. 662):

"The action of the applicants in curtailing the decision-making power of the Commission demonstrates their unwillingness to conform to the provisions of the Act; this in itself would require the denial of the applications."

relies solely on the Commission's earlier orders which are not under review and which had been abandoned by the Commission in its search for a decision best serving the public interest. Admittedly, these earlier orders also considered the price element, but that fact does not alter the unequivocal language of the June 24 order which discloses that the initial price was considered in the Commission's determination of the public convenience and necessity.

It is simply not true that any conditions were attached to the applications involved, either in fact or by implication. The Producers' applications were in the customary form and judicially met all applicable requirements.[37] The Commission did not conduct a "limited inquiry" in any sense but, as reflected by the June 24 order, considered the entire ambit of elements comprising the public convenience and necessity. The fact that the court below might have conducted the inquiry differently does not justify its reversal of the June 24 order. *United States* v. *Detroit & Cleveland Nav. Co.*, 326 U.S. 236, 241 (1945); *Department of Conservation of Louisiana* v. *FPC*, 148 F. 2d 746, 750 (5th Cir., 1945). Obviously the Producers could not and did not curtail the decision-making power of the Commission.

It is impossible to point to any provision of the Act to which the Producers were unwilling to conform or to show that they have not complied precisely with the requirements applicable to the submission of certificate applications by Producers.[38] On the contrary, there is unchallenged evidence in the record to support the Commission's findings that the Producers were willing to conform to the Act and the regulations thereunder (R. 570). Apparently, the court below erroneously assumed that the mere filing of the cer-

[37] See Section 7(d), 56 Stat. 84 (1942), 15 U.S.C. 717f(d) (1952), and 18 C.F.R. 157.23-157.31.

[38] 18 C.F.R. 157.23-157.31.

tificate applications somehow required the Producers to accept whatever certificates were eventually issued to them. Only such a misunderstanding could give rational meaning to the court's use of the term "threat" to describe the legal refusal by the Producers to commit their reserves upon terms different from those contained in their contracts.

The Commission was authorized by Section 19(a) to reconsider and review its prior orders and upon reevaluating the complex of factors inherent in determining the public convenience and necessity, to issue the June 24 order. The fact that such action was taken in light of the Producers' decision to exercise their contractual right of cancellation did not affect the Commission's authority. Such considerations are completely immaterial to the determinative issue in this case—whether the June 24 order is a proper exercise of the administrative discretion vested in the Commission under the Natural Gas Act which is adequately supported by substantial evidence. Consideration of this fundamental issue marked the proper limit of judicial inquiry in reviewing the Commission's June 24 order.

III

THE COURT OF APPEALS ERRONEOUSLY PREDICATED ITS DECISION UPON A SUA SPONTE DETERMINATION OF THE COMMISSION'S AUTHORITY UNDER THE NATURAL GAS ACT.

Reversal of the decision below is independently required because of a clear violation by the Court of Appeals of the express limits on its reviewing authority.

The power of a court of appeals to review an order of the Federal Power Commission is limited strictly by Section

19(b)[39] of the Act which contains the "distinctive formulation of the conditions under which resort to the courts may be made and Congress determines the scope of jurisdiction of the lower Federal courts." *FPC* v. *Pacific Power & Light Co.*, 307 U.S. 156, 159 (1939). Section 19(b) of the Act limits the objections to be considered by the reviewing court as follows:

> "No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure to do so."

The decision rendered by the court below expressly rejects the errors urged by Respondents as to abuse of discretion. Instead, the court relies entirely upon its determination that because the Producers refused to accept certificates conditioned on an initial price lower than had been agreed upon in their contracts, the Commission was automatically deprived of authority to reconsider their certificate applications and to issue its June 24 order (R. 658, 662). No question as to jurisdiction[40] of the Commission was urged by any party on application for rehearing or otherwise while this matter was pending before the Commission or before the Court of Appeals. Thus, the decision rendered below is a flagrant disregard of the statutory limit on judicial review.

The unequivocal limitation upon the power of judicial review contained in Section 19(b) was emphatically en-

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[39] 52 Stat. 831 (1938), 15 U.S.C. 717r(b) (1952).

[40] The basis for the decision of the Court of Appeals was not a total lack of jurisdiction such as would be the case if an administrative agency other than the Federal Power Commission had issued Producers a Section 7(c) certificate. Rather here, the Court determined *sua sponte* that the jurisdiction of the Federal Power Commission had not been properly invoked because of the Producers' refusal to accept an initial rate lower than that specified in their contracts.

forced in *FPC* v. *Colorado Gas Co.*, 348 U.S. 492, 498-499 (1955), where this Court condemned the consideration of an objection which had not been urged before the Commission, holding:

> "Respondent's second and principal contention is that, although its application did not meet the requirements of Section 19(b) and *it* therefore is barred from attacking the validity of the merger conditions in the Court of Appeals, nothing precludes that court itself from raising, considering and sustaining the same objection, sua sponte. Respondent's error appears on the face of the statute. Section 19(a) first precludes the *bringing* of any proceeding in a Court of Appeals to review an order of the Commission, *unless the person bringing it previously has applied to the Commission for a rehearing on that order.* Section 19(b) then expressly precludes the *consideration* by the court of any objection to an order of the Commission, *unless the objection shall have been urged before the Commission in the application for rehearing.* As the court is thus expressly *precluded from considering* an objection when, without prior application to the Commission, that objection is presented to the court by the party directly aggrieved, it cannot be assumed that Congress intended to *permit* the same court to consider the same objection, under the same circumstances, sua sponte, merely because the objection was *not* presented to the court by the party aggrieved. Section 19(b) reflects the policy that a party must exhaust its administrative remedies before seeking judicial review. To allow a Court of Appeals to intervene here on its own motion would seriously undermine the purpose of the explicit requirements of Section 19(b) that objections must first come before the Commission." (Court's italics.)

See also, *American Power & Light Co.* v. *SEC*, 141 F. 2d 606 (1st Cir., 1944), aff'd, 329 U.S. 90 (1946); *Magnolia Petroleum Co.* v. *FPC*, 236 F. 2d 785, 789 (5th Cir., 1956);

Memphis Light, Gas & Water Division v. *FPC*, 243 F. 2d 628, 632 (D.C. Cir., 1957).

The *American Power and Light Company* case, *supra*, is striking in points of similarity with the situation here. There, the Securities and Exchange Commission, pursuant to Section 11(b)(2) of the Public Utility Holding Company Act,[41] had issued orders requiring dissolution of two subsidiaries of Electric Bond & Share Company. Review was sought pursuant to Section 24(a) of the Public Utility Holding Company Acts,[42] which is substantially identical with Section 19(b) of the Natural Gas Act. Petitioners sought to raise on review, for the first time, a question of whether Section 11(b)(2) authorized the dissolution of subholding companies as one method of bringing a holding-company system into compliance. The court held that it had no power to review the question, stating (141 F. 2d at 613):

> ". . . there can be no doubt that under §24(a) Petitioners were obliged to raise before the Commission issues as to the *Commission's statutory authority* to issue the contemplated orders." (Italics supplied.)

In one respect, our case differs, and this lies in the fact that here it was the court below which first raised the issue of the Commission's statutory authority. Further, this statutory limitation has been applied to a reviewing court's authority, even where matters of the Commission's jurisdiction are involved. In *Panhandle Pipe Line Co.* v. *FPC*, 324 U.S. 635, 649-651 (1945), this Court held that the company's failure in its application for rehearing to question the Com-

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41 Section 11(b)(2) of the Act of August 26, 1935, 49 Stat. 820 (1935), 15 U.S.C. 79k(b)(2) (1952).

42 Section 24(a) of the Act of August 26, 1935, 49 Stat. 834 (1935), as amended, 15 U.S.C. 79x (1952).

mission's jurisdiction to include producing properties in its rate base precluded the reviewing court's consideration of that question.

The decision of the court below should be reversed, if for no other reason, because the court transgressed the statutory limits on its reviewing authority.

CONCLUSION

WHEREFORE, for all the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

Pertinent Provisions of the Natural Gas Act

The pertinent provisions of the Natural Gas Act of June 21, 1938, c. 556, 52 Stat. 821, as amended by Act of February 7, 1942, c. 49, 56 Stat. 83; 15 U.S.C. 717-717w, are as follows:

"Sec. 4.(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

* * * * * * *

"Sec. 4.(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders

with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U.S.C. 717c (1946)]

* * * * * * *

"Sec. 5.(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classifi-

cation, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * * * *

"Sec. 7.(a) Whenever the Comfission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers. [52 Stat. 824 (1938); 15 U.S.C. 717f (a) (1946).]

"Sec. 7.(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the con-

struction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this mandatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

"In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice of hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts of operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. § 717f (c) (1946)]

"Sec. 7.(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall by regulation, require. [56 Stat. 84 (1942); 15 U.S.C. §717f (d) (1946)]

"Sec. 7.(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f (e) (1946)]

* * * * * * *

"Sec. 19.(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to

grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

"Sec. 19.(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken

before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended * * * ."

* * * * * * *

Pertinent Sections of the Commission's Regulations

The pertinent sections of the Commission's Regulations under the Natural Gas Act, 18 C.F.R. 152.1 et seq., are as follows:

"Sec. 157.20 General conditions applicable to certificates

Except as otherwise specifically ordered by the Commission, such of the following terms and conditions, among others, as the Commission shall find is required by the public convenience and necessity, shall attach to the issuance of each certificate and to the exercise of the rights granted thereunder.

(a) The certificate shall be void and without force or effect unless accepted in writing by applicant within 30 days from the issue date of the order issuing such certificate: *Provided, however,* That when an application for rehearing of such order is filed in accordance with section 19 of the Natural Gas Act, such acceptance shall be filed within 30 days from the issue date of the order of the Commission upon the application for

rehearing or within 30 days from the date on which such application may be deemed to have been denied when the Commission has not acted on such application within 30 days after it has been filed: *Provided further,* That when a petition for review is filed in accordance with the provisions of section 19 of the Natural Gas Act, such acceptance shall be filed within 30 days after final disposition of the judicial review proceedings thus initiated.

(b) Any authorized construction, extension, or acquisition shall be completed and in actual operation by applicant and any authorized operation, service, or sale shall be actually undertaken and regularly performed by applicant within (period of time to be specified by the Commission in each order) from the issue date of the Commission's order issuing the certificate.

(c) Applicant shall file with the Commission, in writing and under oath, an original and four conformed copies of the following: (1) within ten days after the *bona fide* beginning of construction, notice of the date of such beginning; (2) each three months after filing notice of commencing construction, a progress report showing the exact status of authorized construction; (3) within ten days after authorized facilities have been constructed and placed in service or any authorized operation, sale, or service has commenced, notice of the date of such placement and commencement; and (4) within six months after authorized facilities have been constructed and placed in service and authorized operations have commenced, a statement showing, on the basis of all costs incurred to that date and estimated to be incurred for final completion of the project, the cost of constructing authorized facilities, such total cost to be classified according to the estimates submitted in the certificate proceeding and compared therewith and any significant differences explained.

(d) With respect to an acquisition authorized by the certificate, applicant shall file with the Commission, in writing and under oath, an original and four conformed copies of the following: (1) Each 3 months

after the issue date of the Commission's order issuing this certificate, a progress report showing the exact status of the acquisition; (2) within 10 days after acquisition and the beginning of authorized operations, notice of the dates of acquisition and the beginning of operations; and (3) within 6 months after consummation of the acquisition, a statement showing and explaining the cause for any differences between the actual cost of the facilities acquired and the estimates of cost relied upon by applicant in the proceeding in which the certificate is issued.

(e) The certificate issued to applicant is not transferable in any manner and shall be effective only so long as applicant continues the operations authorized by the order issuing such certificate and in accordance with the provisions of the Natural Gas Act, as well as applicable rules, regulations, and orders of the Commission.

"Sec. 157.23 Applications for Certificates of Public Convenience and Necessity by Independent Producer

(a) Every independent producer of natural gas as that term is defined in section 154.91 who, on or since June 7, 1954, has engaged in the interstate transportation or sale of natural gas subject to the jurisdiction of the Commission, and who has not heretofore obtained from the Commission a certificate of public convenience and necessity pursuant to section 7 of the Natural Gas Act, as amended, shall, on or before December 1, 1954, file with the Commission an application (original and 7 copies) in accordance with sections 157.24 through 157.27. The Commission reserves the right to request additional copies. Independent producers whose sales of natural gas subject to the jurisdiction of the Commission amount in the aggregate to less than 1,000,000 Mcf annually, may, in lieu of the foregoing, file by December 1, 1954 an application (original and five copies) containing the information called for by Ex-

hibit A. Pending action by the Commission on an application hereunder, the service for which authorization is sought shall be continued.

(b) No independent producer of natural gas shall, subsequent to the issuance of these rules, engage in any new service with respect to the transportation of natural gas in interstate commerce or sale of such natural gas for resale in interstate commerce subject to the jurisdiction of the Commission without approval of the Commission, evidenced by a certificate of public convenience and necessity authorizing such transportation or sale upon application (original and 7 copies) pursuant to sections 157.24 through 157.27. The Commission reserves the right to request additional copies. Independent producers whose sales of natural gas subject to the jurisdiction of the Commission will amount in the aggregate to less than 1,000,000 Mcf annually may, in lieu of the foregoing, file an application (original and five copies) containing the information called for by Exhibit A. Where the economic feasibility of a new pipe line or important extension or expansion of an existing pipe line depends upon proof of an adequate gas supply, all related applications necessary to effectuate the service shall be filed within time to enable the Commission to consider all related matters concurrently.

(c) Filings hereunder shall be made by signatory operators and signatory owners as provided in § 154.91 of this chapter.

"Sec. 157.24 Contents of applications

(a) Every application for a certificate of public convenience and necessity required under § 157.23 hereof shall be filed with the Commission and shall set forth in the order indicated the following:

(1) The exact legal name of the applicant; if the applicant is a corporation, the State or territory under the laws of which the applicant is organized, the loca-

tion of applicant's principal place of business, and the names of all States where applicant is authorized to do business.

(2) The same data required by paragraph (1) of this section with respect to any predecessor in interest of the applicant bona fide engaged in the transportation or sale of natural gas subject to the jurisdiction of the Commission on June 7, 1954.

(3) The name, title, and post office address of the person to whom correspondence or communications in regard to the application is to be addressed. Unless advised to the contrary, the Commission will serve all notices, orders, and other papers, service of which is required upon the person so named.

(4) A statement of pertinent facts showing that applicant or a predecessor in interest of applicant was a natural-gas company within the meaning of the Natural Gas Act and was bona fide engaged in transportation of natural gas in interstate commerce or sale of natural gas in interstate commerce for resale on June 7, 1954, or upon commencement of the proposed transportation or sale of natural gas would be a natural-gas company. Without limitation upon the requirements of this paragraph, such statement shall include a showing of:

(i) The sources of the gas (a) produced by applicant or predecessor and (b) purchased by applicant or predecessor. In case of gas produced, give the approximate location of the fields and the points of delivery, and in the case of gas purchased, the names of the sellers and points of delivery.

(ii) The route or routes of the pipe lines over which such transportation or sale of natural gas was or will be accomplished.

(iii) Any communities served on June 7, 1954 or proposed to be served (a) at wholesale or (b) at retail.

(iv) The names of, and points of delivery to, any main line industrial customers (i.e., not located within communities under (iii) above) purchasing or proposing to purchase 25,000 Mcf or more per year. Such main line industrial customers purchasing 100,000 Mcf or more per year, shall be given the identifying designations I-1, I-2, etc., which designations shall be used in lieu of names on Exhibit A of the application.

(v) Any major appurtenant properties and facilities, such as compressor stations, gasoline plants, dehydration plants, purification plants, and gas storage projects.

(b) Any information required which is already on file with the Commission may be incorporated by reference. If an applicant is unable to secure required information in time for filing with his application, a statement setting forth the reasons for his failure to file the missing information should be submitted with a request for further time, which may be granted up to 90 days.

"Sec. 157.25 Necessary Exhibits

There shall be filed with the application as a part thereof the following exhibits:

Exhibit A. Map. Each applicant under section 157.24 shall file as a part of his application a general map or sketch of applicant's facilities for the production, transportation, or sale of natural gas as Exhibit A. The map need be only of sufficient scale and in sufficient detail to show the general geographical location of the properties.

(a) The location of gas fields from which gas is or will be produced by applicant or affiliated companies or at which gas is or will be purchased by applicant.

(b) The location of applicant's principal pipe line and the diameter thereof.

(c) The points of connection with the facilities or pipe-line systems of other companies.

(d) The designation of points of delivery of gas to applicant's system.

(e) The communities served or proposed to be served at wholesale and at retail, indicating wholesale by by a small square and retail by a small circle.

(f) The designation of points of delivery of gas from applicant's system, including points of delivery to main line industrial customers purchasing 100,000 Mcf or more per year. Such main line industrial customers are to be designated I-1, I-2, etc., as indicated in § 157.24 (a) (4) (iv).

Exhibit B. Contracts. Conformed copy of each contract for sale or transportation of gas for which a certificate is requested: *Provided, however,* That contracts on file with the Commission in other proceedings may be included by reference as heretofore provided in § 157.24 (b); *and provided further,* That acceptance of contracts hereunder shall not be construed as approval of the rates therein contained under Part 154 hereof or under the Natural Gas Act. Escalation clauses in contracts submitted hereunder on or after May 1, 1955 will not be considered in support of any certificate application or otherwise given effect by the Commission if under such clauses: (a) provision is made for adjustment of the price of the seller by reason of changes in the prices received by the purchaser upon resale; or (b) if provision is made for adjustment of the price of the seller by reason of the payment of higher prices by other purchasers in the same or other producing areas.

"Sec. 157.26 Form of filing

Except with respect to the number of copies required, an application filed under § 157.23 shall be in compliance with §§ 1.15 and 1.17 of the Rules of Practice and Procedure, and in addition the original of the application (which shall include the originals of all exhibits accompanying said application) shall be veri-

fied under oath by a person having knowledge of the matters therein set forth.

[Section 157.26 amended by order 196, 22 F. R. 2881, Apr. 24, 1957]

"Sec. 157.27 Other information

The applicant may be required to furnish such additional information as the Commission may deem pertinent.

Pertinent Sections of the Commission's Rules

The pertinent sections of the Commission's Rules of Practice and Procedure, 18 C.F.R. 1.1 et seq., are as follows:

"Sec. 2.4(d) Suspension of rate schedules

The Commission approved and adopted on May 29, 1945, the following conclusions as to its powers of suspension of rate schedules under section 205 of the act:

(d) An initial rate schedule cannot be suspended.

"Sec. 2.52 Suspension of rate schedules

The Commission, in approving and adopting the interpretation stated in § 2.4, applied it also to the suspension of rate schedules under section 4 of the Natural Gas Act.

ILE COPY

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FILED
FEB 26 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 536

TENNESSEE GAS TRANSMISSION COMPANY, *Petitioner*

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, LONG ISLAND LIGHTING COMPANY, AND PUBLIC SERVICE ELECTRIC AND GAS COMPANY, *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER

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IN THE

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No. 536

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v.

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On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (R. 653-662)[1] is reported at 257 F. 2d 717. The opinion of the Federal Power Commission (R. 484-497) is reported at 17 F.P.C. 880.

[1] The record references set forth herein are to the joint record in case number 518 and this case.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1958 (R. 663). Petitions for Rehearing were denied on August 27, 1958 (R. 667). The petition for a writ of certiorari was filed on November 24, 1958, and was granted on January 12, 1959 (R. 669). The jurisdiction of this Court is based on 28 U.S.C., § 1254(1) (1948), and Section 19(b) of the Natural Gas Act, 52 Stat. 831 (1938), 15 U.S.C. § 717r(b).

QUESTIONS PRESENTED

1. Whether the Commission must, in an independent producer certificate case, determine the justness and reasonableness of the initial price when a question is raised as to the propriety of such initial price, or whether it can defer such matter for determination in a full rate investigation under Section 5(a) of the Natural Gas Act.

2. Whether the Federal Power Commission lacks jurisdiction to issue a certificate of public convenience and necessity to an independent producer of natural gas, where such producer indicates an unwillingness to accept a certificate conditioned on a lower initial price than agreed to by contract.

3. Whether an objection or ground not urged before the Commission on rehearing nor before the Court of Appeals in the review proceeding, can form the basis for the decision of the Court of Appeals.

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act, 52 Stat. 821 (1938), as amended by 56 Stat. 83 (1942), 15 U.S.C., §§717-717w, are set out in the Appendix, *infra*.

STATEMENT

This case stems from the judgment of the Court of Appeals for the Third Circuit (R. 663) on review of an order (R. 484-497) of the Federal Power Commission (Commission) authorizing four independent producers of natural gas to sell gas produced from certain acreage located in the Gulf of Mexico to Tennessee Gas Transmission Company (Tennessee), at the initial price agreed upon in the contracts. The Court of Appeals vacated the Commissions order and remanded the proceedings to the Commission (R. 662).

Tennessee is a natural-gas company subject to the jurisdiction of the Commission. It operates a pipeline system extending from gas fields in Texas and Louisiana through Arkansas, Mississippi, Tennessee, Kentucky, West Virginia, Ohio, Pennsylvania, New Jersey, New York, and into Massachusetts, New Hampshire, Rhode Island and Connecticut. Along this route, it serves over 80 distributing companies, which in turn serve many millions of ultimate consumers.

To meet the constantly increasing demand for gas in this vast market, Tennessee is continuously searching for the best possible gas supplies at the lowest possible prices.[2] To this end, Tennessee, in August, 1956, entered into identical 20-year gas purchase contracts with four producers of natural gas, collectively re-

[2] In Tennessee's recent application in Docket G-11107, it sought authority to increase substantially its system capacity in order to meet the increased requirements of its customers totaling over 300,000 Mcf per day. (17 F.P.C. 461, 469). By order issued January 28, 1959, that application was granted in major part.

ferred to as CATCO[3] (R. 24a-25a, 40a-41a, 286a-328a).[4] These producers each own an undivided 25 per cent interest in leases located a substantial distance off the coast of Louisiana in the Gulf of Mexico (R. 23a-24a, 280a). From those leases, up to two trillion cubic feet of gas is dedicated to the performance of the contracts and an additional trillion cubic feet of gas can also be dedicated under the contracts (R. 236a, 294a-296a).

The CATCO producers filed applications with the Commission for certificates of public convenience and necessity authorizing the sales to Tennessee pursuant to the aforementioned contracts. The Commission consolidated the applications for hearing. By order issued February 27, 1957, Tennessee was permitted to intervene in the consolidated proceeding (R. 330a). By the same order, four customers of Tennessee were permitted to intervene, two of which are respondents herein (R. 330a). The Public Service Commission of the State of New York (New York Commission), the other respondent herein, intervened in the Commission proceeding by the filing of a Notice of Intervention (R. 329a).

The major concern of these intervenors before the Commission was the initial price of 21.4 cents[5] per Mcf

[3] Cities Service Production Company, Atlantic Refining Company, Tidewater Oil Company and Continental Oil Company. None of these companies owns any interest in Tennessee or in each other. Tennessee does not own any interest in any of these companies (R. 24a). These companies are the Petitioners in Case No. 518.

[4] Since the contracts with the four producers are identical, only one of the contracts was designated for printing in the record.

[5] Plus 1 cent for the Louisiana gathering tax. The intervenors were also concerned with escalation provisions in the contracts which required at every four-year interval after November 1, 1962, an automatic increase in price of 2 cents per Mcf (R. 310a).

which Tennessee had agreed to pay for this gas. This price was the result of arm's-length negotiations extending over a period of some ten months (R. 43a). Tennessee acknowledged that this was a higher price than it was paying under any of its other previously-executed contracts.[6]

However, the immensity of the gas reserves dedicated to Tennessee under these contracts makes them unique when compared with Tennessee's other gas purchase contracts. Indeed, as far as is known, it is the largest block of gas ever sold in one transaction on the Gulf Coast (R. 41a-42a, 251a). The CATCO gas reserves constitute from 11 to 12 per cent of the total reserves available to Tennessee (R. 139a-140a) and are located in a new gas producing area where neither Tennessee nor any other pipeline company had gas purchase contracts (R. 43a-44a).

This large reserve is well located in relation to Tennessee's system, thereby affording Tennessee an entry into the vast areas of gas reserves situated off-shore from the State of Louisiana (R. 41a, 250-251a). To attach the reserves Tennessee had to construct only 46.4 miles of pipeline (R. 45a-46a). This is to be contrasted with over 500 miles of pipeline which Tennessee had to build in order to bring certain Texas gas into its system. Further indication of the value of these

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This concern was alleviated by the producers, however, by their later agreement to modify these provisions so that the Commission would retain jurisdiction over the increases in the event the Harris Bill (H.R. 6790, 85th Congress), or substantially similar legislation was enacted into law (R. 488).

[6] Assuming the purchase of 240,000 Mcf of gas per day under the instant contracts during the entire year 1958, Tennessee's weighted average cost of gas would be increased by only 0.97 cents per Mcf (R. 45a).

reserves in relation to location is shown by the fact that El Paso Natural Gas Company, which was also negotiating for these same reserves, would have had to build 600 miles of pipeline to bring the gas involved into its system (R. 250a, 42a). Among other pipeline companies attempting to purchase these reserves were Southern Natural Gas Company, United Fuel Gas Company and American Louisiana Pipe Line Company (R. 42a).

While the Respondents herein attacked the initial price of 21.4 cents per Mcf as being too high, *no evidence in support of their contention was offered.* They nevertheless urged that the certificates be conditioned on a lower price, although, as shown below, each of them differed on what that price should be (R. 378a-379a, 389a, 390a).

On March 29, 1957, the Presiding Examiner issued his Decision (R. 335a-359a) wherein he recommended a grant of the producer certificates applied for, but declined to impose a condition requiring a reduction in the initial price of 21.4 cents. In exceptions filed to that decision, the New York Commission requested the imposition of a condition requiring an initial price of 15.4 cents per Mcf, exclusive of tax (R. 389a); Lake Shore Pipe Line Company (not a party herein) requested a 17-cent initial price; Public Service Electric and Gas Company (Public Service) requested the imposition of a price condition "which would require that the proposed sales be made at such lower price which would protect the interest of the consumers" (R. 394a); and Long Island Lighting Company (Long Island) requested that if the 21.4-cent initial rate were permitted to stand, the rate be made the subject of rate

investigations under Section 5(a) of the Natural Gas Act[7] (R. 379a-380a).

On April 22, 1957, the Commission, upon review of the Examiner's Decision, issued an order (R. 519-525; 17 F.P.C. 574) granting temporary certificates to the producer-applicants,[8] but remanded the matter to the Presiding Examiner "to determine at what rate the public convenience and necessity requires the sale of natural gas by CATCO to Tennessee Gas to be made if these CATCO companies are granted permanent certificates of public convenience and necessity" (R. 524; 17 F.P.C. 574, 576).[9]

A motion for modification of the April 22, 1957 order was filed by the producer-applicants on May 6, 1957 (R. 396a-404a), in which they pointed out that the economic risk to which they would be exposed precluded their acceptance of the temporary certificates. Accordingly, they requested the issuance of permanent certificates without condition as to initial price. They did offer, however, to amend the price escalation provisions of the contracts so as to assure Commission jurisdiction over such prices in the event the Harris Bill (H.R. 6790, 85th Congress) was enacted into law (R. 401a-403a).

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[7] This is precisely what was done by the Commission in its Order here involved (R. 487-488).

[8] By the same order, a temporary certificate was issued to Tennessee authorizing the construction of the facilities necessary to bring the gas into its system. Such facilities have been constructed.

[9] The Commission there concluded that there was insufficient evidence on which to base a finding that the public convenience and necessity required the sales at the particular price proposed (R. 521; 17 F.P.C. 574, 575).

On May 20, 1957, the Commission issued an order in which it granted permanent certificates to the producer-applicants as requested in their motion for modification. By the same order, however, it conditioned the certificates by requiring an amendment of the gas purchase contracts so as to provide for an initial price of 17 cents per Mcf (exclusive of the one-cent gathering tax) with the right of the producers to file for an increase in rates (not to exceed 21.4 cents per Mcf) to be effective one day after commencement of deliveries to Tennessee (R. 526-534; 17 F.P.C. 732). The price of 17 cents was selected by the Commission simply because it was the highest price then being paid by Tennessee for gas purchased in the southwestern part of the United States (R. 529; 17 F.P.C. 732, 734).

On June 4, 1957, Tennessee filed an Application for Rehearing of the May 20, 1957 order (R. 416a-423a). In its Application for Rehearing, Tennessee stated (R. 418a):

> "Tennessee has been definitely advised by the producer-applicants that they will not amend Section 10 of the contract so as to change the initial rate from 21.4 cents per Mcf to 17 cents per Mcf. Tennessee has been further informed by the producer-applicants that the certificates issued by said order will not be accepted by them for that reason, and that, accordingly, the contracts will be terminated. It is clear, therefore, that Tennessee now faces the stark reality of contract termination; and its customers face the grim reality of suffering the loss of natural-gas supplies which are required to insure adequate and continuous long-term service and to meet the expanding needs of the consumers. The consequences of the loss of these valuable gas reserves are so far-reaching and the impact thereof on the economy of the areas involved is so great as to stagger the imagination. * * *"

Oral argument on the application for rehearing was held before the entire Commission, and on June 24, 1957 the order here involved (R. 484-497)[10] was issued by the Commission. Upon further evaluation of the record, the Commission found that "the record does not show that the 21.4 cent price is excessive." It concluded that in the light of the circumstances involved, and in view of the fact that it could protect the public "with respect to the matter of price" through the rate investigation provisions of the Act, the "precise charge that is made initially is less important than the assurance of this great gas supply." The Commission, therefore, reversed its previous determination and issued certificates without any condition affecting the initial price. While the order permitted the initial rate to remain at 21.4 cents, it made the rate subject to investigation as to the justness and reasonableness thereof in Section 5(a) proceedings instituted against all four of the producer-applicants (R. 487-488).[11]

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[10] At the oral argument its was demonstrated that in a number of cases the Commission had authorized sales along the Louisiana Gulf Coast at an initial price of 20 cents or more (See also R. 248a-249a). For example, see *Houston, Texas Gas & Oil, et al.*, 16 F.P.C. 118, 125, where the initial price was "21.0 cents per Mcf for the first two years after initial delivery and 22.5 cents per Mcf after the first two years." Affirmed on appeal, where intervenors raised a price issue similar to that raised in the instant case, *sub nom., Florida Economic Advisory Council v. F.P.C.*, 251 F. 2d 643, 646 (D.C. Cir. 1957); *cert. denied*, 356 U.S. 959.

[11] Section 5(a) rate investigations had already been instituted against three of the producers. Accordingly, concurrently with the issuance of the June 24, 1957 order, the Commission instituted a Section 5(a) investigation against the fourth producer, Cities Service Production Company (R. 488). Those investigations are now in progress.

In the same order, the Commission required the contracts to be amended "so that the price increases will remain subject to our control by using 'indefinite pricing clauses' rather than 'definite pricing clauses' within the meaning of the Harris Bill [H.R. 6790, 85th Congress]."

The respondents filed petitions for review (R. 475-620) which were predicated, in essence, on the contention that the Commission abused its discretion in not conditioning the certificates on a lower price. The Court of Appeals, in vacating the Commission's order, stated, *inter alia:*

> "* * *. We conceive of the question, however, as a more fundamental one, involving the statutory jurisdiction of the Federal Power Commission. It is whether the Commission has authority to consider an application for a certificate under Section 7(e) where the terms of the application limit the scope of the inquiry which the Commission is required to make for a determination of public convenience and necessity." (R. 658).
>
> * * * * *
>
> "It was only after the threat of withholding the gas from the interstate market that the Commission retreated from its previous position and granted the certificates without rate conditions by its order of June 24, 1957." (R. 660).
>
> * * * * *
>
> "The Commission has jurisdiction to issue certificates under Section 7(e) based upon its independent judgment after an untrammelled consideration of all the elements which it deems necessary to arrive at that judgment. Congress has not given the Commission power to inquire into the issue of public convenience and necessity where, as here, the applicant circumscribes the scope of that inquiry by attaching a condition to its appli-

cation requiring the Commission to forego the consideration of an element which may be necessary in the formulation of its judgment. Otherwise stated, the Commission has not been endowed by Congress with jurisdiction to conduct a *limited* inquiry.

"Congress has also made it clear that the applicant must be *willing* to perform the services proposed and conform to the provisions of the Act. The action of the applicants in curtailing the decision-making power of the Commission demonstrates their unwillingness to conform to the provisions of the Act; this in itself would require the denial of the applications. The Commission's function is to regulate the sale of gas by producers willing to sell under regulations arrived at in accordance with the provisions of the Act. Such regulations may not be the result of bargaining with an unwilling seller." (R. 662).

SUMMARY OF ARGUMENT

The principal question presented by this case is whether an independent producer of natural gas deprives the Commission of jurisdiction to consider his application for a certificate to sell gas in interstate commerce when he advises the Commission that he will decline to accept a certificate conditioned on a lower initial price being charged than agreed upon in his contract with the pipeline company buyer. The court below, *sua sponte*, held that such advice by the producer deprived the Commission of jurisdiction to consider further the application.

Implicit in the decision of the court below is the assumption by the court that a finding of justness and reasonableness of the initial price to be charged for gas is a required finding in a certificate case under Section 7(e) of the Natural Gas Act; and that, there-

fore, the Commission cannot leave for determination in a simultaneously-instituted Section 5(a) rate investigation the question of the justness and reasonableness of the initial price.

Section I of this brief treats the question of whether a finding of justness and reasonableness of the initial price is a prerequisite to the issuance of a certificate in a Section 7(e) proceeding. Section II of this brief discusses the jurisdictional issue raised and decided by the court below. Section III of the Brief demonstrates the *sua sponte* nature of the decision of the court below.

I

Section 7(e) of the Natural Gas Act requires that a certificate shall be issued to any qualified applicant if the Commission finds that "the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act * * * and that the proposed * * * sale * * * will be required by the present or future public convenience and necessity * * *." Nowhere, in Section 7 (the Certificate Section of the Act) is there a requirement that the Commission must affirmatively find that the initial price at which a sale of gas is to be made is just and reasonable.

In the case at bar, the Commission made no determination as to the justness and reasonableness of the initial price. From the record, it could not be determined whether the price was just and reasonable or unjust and unreasonable. The record did show that the price was higher than Tennessee was paying under its other gas purchase contracts, but such fact, in itself, does

not prove that the price is unjust and unreasonable. This is particularly so inasmuch as the gas involved is produced from wells located several miles off-shore from the State of Louisiana in the waters of the Gulf of Mexico, where drilling costs obviously are much higher than on-shore.

Faced with the fact that the large block of gas involved was urgently needed to serve interstate markets, that the leases were in jeopardy unless production were commenced in 1958, and that the producers would not accept a lower *initial* price than the 21.4-cent price agreed upon in the contracts, the Commission, in its informed judgment, certificated the sales without imposing a condition, as requested by Respondents, requiring the sale to be made at a lower initial price. At the same time, however, the 21.4-cent price was made the subject of full-fledged rate investigations under Section 5(a) of the Natural Gas Act.

The Commission could have insisted in the exercise of its discretion, that proof of the justness and reasonableness of the initial price be made in the certificate case. But the submission of such proof and the decision thereon would have resulted in considerable delay, if not complete frustration, in Petitioner's efforts to bring needed gas supplies to the consuming public. This is particularly so in view of the fact that in the relatively short period of time which has elapsed since this Court's decision in *Phillips Petroleum Company v. State of Wisconsin*, 347 U.S. 672, 74 S. Ct. 794 (1954), the Commission has been unable to establish firm standards or criteria by which to measure the justness and reasonableness of producer prices for gas. This is unlike the situation in the natural gas pipeline field where standards and criteria have been developed by which

the justness and reasonableness of pipeline rates can be measured. *City of Detroit, Michigan* v. *F.P.C.*, 230 F. 2d 810 (D.C. Cir., 1955), *cert. denied* 352 U.S. 829 (1956).

It goes without saying that if a finding of justness and reasonableness as to initial rates is *mandatory* under Section 7(e) of the Natural Gas Act, then administrative necessity or convenience may be insufficient to avoid such requirement. If such a finding is not mandatory—as we contend it is not—then the failure to make such a finding cannot be error unless an abuse of discretion is involved. Here, the Commission exercised its discretion after giving careful consideration to the consequences which might flow from imposing a price condition in the certificates. Only if the Commission acted arbitrarily are the courts justified in overturning the decision. *Ayrshire Collieries Corp.* v. *U. S.*, 335 U.S. 573, 69 S. Ct. 278 (1949); *Radio Corp. of America* v. *U. S.*, 341 U.S. 412, 71 S. Ct. 806 (1951); *Panhandle Eastern Pipeline Company* v. *F.P.C.*, 232 F. 2d 467, 473 (3rd Cir. 1956); *Charleston and Western Carolina Ry. Co.* v. *F.P.C.*, 234 F. 2d 62, 64 (D.C. Cir. 1956).

It cannot be gainsaid that the rate standard of the Natural Gas Act, as reflected in Sections 4(a) and 5(a) thereof, is justness and reasonableness. But that is not to say that *findings* as to justness and reasonableness must be made before a rate is permitted to become effective. Were such findings mandatory, the Commission would be required to suspend each and every change in rate filed by a natural-gas company, and determine the justness and reasonableness thereof before permitting that changed rate to be collected

without an undertaking to refund such portion thereof as may later be found unjustified (Section 4(e)). Section 4(e) of the Act, however, clearly makes the suspension of rates *discretionary* with the Commission. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 338, 76 S. Ct. 373, 377-8 (1956).

Indeed, if a finding of justness and reasonableness is a mandatory requirement under Section 7(e) of the Act, then the imposition by way of a certificate condition of a lower initial price than agreed to by contract would appear to be unlawful, unless the Commission were able to find that such lower initial price itself was just and reasonable. At no time during the course of this proceeding before the Commission or the court below, did the Respondents submit any proof or make any contention that a finding of justness and reasonableness could be made with respect to any of the lower prices which they urged the Commission to adopt by way of a certificate condition.

Were the Commission to require proof of the justness and reasonableness of initial prices (notwithstanding the lack of established standards) in producer certificate cases, the entire administration of the certificate provisions of the Natural Gas Act would completely bog down. Pipeline companies are continuously applying for certificates to enable them to expand to meet the ever-growing needs of the markets for natural gas. To meet such needs, gas must be obtained from independent producers. Obviously, the expansion of the natural-gas industry would come to a virtual standstill if the gas supplies are tied up in protracted certificate cases turned into *de facto* rate cases. The Commission has recognized this fact and

has, with only a single exception (*Signal Oil and Gas Company* v. *F.P.C.*, 238 F. 2d 771 (3rd Cir., 1956)), declined to resolve the price question in producer certificate cases.

II

There is no basis in the Natural Gas Act for concluding that the act of filing an application for a certificate automatically subjects the gas involved to the jurisdiction of the Commission. A producer of natural gas is free to sell his gas in an interstate market, an intrastate market, or use it himself for various purposes. Until a producer places his gas in interstate commerce, he is not subject to the jurisdiction of the Commission. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company*, 337 U.S. 498, 69 S. Ct. 1251 (1949). *Cf. The Central West Utility Company* v. *F.P.C.*, 247 F. 2d 306 (3d Cir., 1957).

The rules and Regulations of the Commission recognize that an applicant need not accept the certificate tendered to him. Thus, Section 157.20 of the Commission's Rules and Regulations (18 C.F.R. 157.20) specifically provides that a certificate, to be effective, must be accepted by the applicant in writing within 30 days from the date of issuance.

The legislative history of Section 7(e) (*infra*, pp. 34, 35), also demonstrates conclusively that an applicant does not subject his gas to the jurisdiction of the Commission by the mere act of filing an application for a certificate.

Every applicant for a certificate is, therefore, in practical and legal effect, requesting a certificate

exactly as applied for in his application. Implicit in every application is the understanding (based on the Commission's own Rules and on Section 7(e) of the Act) that unless the certificate issued to the applicant is acceptable to him, he will refuse to accept it and subject his property to the jurisdiction of the Commission. Patently, it cannot be assumed—as the court below apparently did—that implicit in the act of filing an application is the willingness of the applicant to accept any certificate, regardless of the conditions imposed therein, issued by the Commission. This being the case, the court below was clearly in error in holding that the stated unwillingness of the producer applicants to accept the certificates conditioned on a lower initial price than that contained in the contracts automatically made them ineligible to receive certificates, and thereby deprived the Commission of statutory authority to issue such certificates.

The court below was of the view that the stated unwillingness of the producers to accept a lower initial price for their gas circumscribed the scope of the Commission's inquiry thereby "requiring the Commission to forego the consideration of an element which may be necessary in the formulation of its judgment." But the order of the Commission here involved demonstrates very clearly that the Commission did consider very carefully the question of initial price. Indeed, the major part of the order deals with the question of price. To be sure, the Commission did not attempt to make findings as to the justness and reasonableness of the initial price. (Such findings, as we demonstrate in Section I of this Brief, are not necessary in producer certificate cases.) But that is not to say that the Commission gave no con-

sideration to the matter of price. It did not blindly certificate the sales involved in complete disregard of the price question. Since there was no showing in the record that the price was excessive, and since the gas was urgently needed for the interstate market, the Commission, in its discretion, certificated the sales at the initial price proposed, but made that price subject to a full rate investigation under Section 5(a) of the Act.

It would be one thing if the record showed that the initial price was excessive, and notwithstanding such a record, the Commission certificated the sales without more. It is quite another thing, however, where, as here, there was no showing that the initial price was excessive and where, as here, the Commission did make the price subject to a Section 5(a) rate investigation. If, as a result of such investigation, the price is determined to be too high, the Commission has authority to prescribe a lower price. It is a fact that if the price actually turns out to be too high, there is no way by which the excess in price paid in the interim can be recouped. That fact, however, is one of the facts necessarily considered by the Commission together with all the other facts bearing on the public convenience and necessity. Patently the Commission considered the possibility of Tennessee having to pay temporarily a price which *might* be excessive, to be outweighed by the immediate need of the consumers for the gas. Such determination, we submit, was peculiarly within the administrative competence of the Commission, and was a proper exercise of its statutory duties. Even though a reviewing court would not have made the same determination, it is not justified in substituting its judgment for that of the Commission. *Pan-*

handle Eastern Pipe Line Company v. *F.P.C., supra; Charleston & Western Carolina Ry. Co.* v. *F.P.C., supra; Radio Corp of America* v. *U. S., supra.*

III

Section 19(a) of the Natural Gas Act provides that as a condition precedent to invoking the review authority of the courts, a petitioner must first file with the Commission an application for rehearing setting forth the specific ground or grounds upon which such application is based. Section 19(b) of the Act provides further that:

> "* * * No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. * * *"

The decision of the court below rests on its determination, *sua sponte,* that the Commission lacked authority to issue a certificate once the applicants advised the Commission that they were unwilling to accept a certificate conditioned on a lower initial price. Even assuming, *arguendo,* that this determination is correct, the court below was precluded from deciding this case on such ground because it was not first raised before the Commission by Petitioners below (Respondents here). *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 324 U.S. 635, 649-651; 65 S. Ct. 821, 828-829 (1945). *Cf. Halsted* v. *S.E.C.*, 182 F. 2d 660, 669-70 (D.C. Cir. 1950); Courts are also precluded from raising the matter *sua sponte. Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498-501, 75 S. Ct. 467, 471-3 (1955).

ARGUMENT

I.

A FINDING OF JUSTNESS AND REASONABLENESS OF THE INITIAL PRICE FOR GAS IS NOT REQUIRED IN ORDER TO GRANT A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

The court below was of the view that:

> "* * * Congress has not given the Commission power to inquire into the issue of public convenience and necessity where, as here, the applicant circumscribes the scope of that inquiry by attaching a condition to its application requiring the Commission to forego the consideration of an element which may be necessary in the formulation of its judgment. Otherwise stated, the Commission has not been endowed by Congress with jurisdiction to conduct a *limited* inquiry" (R. 662).

The element which the court below felt "may be necessary in the formulation of its [the Commission's] judgment" was the element of the initial price[12] for the gas. Thus, implicit in the opinion of the court below is the holding that the Commission must in every producer certificate case find that the initial price agreed upon by contract is just and reasonable before it can issue a certificate. For without such a finding, it would have omitted an element which the court below considered "a necessary consideration in the scope of inquiry into the determination of public convenience and necessity" (R. 662).[13]

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[12] The words "price" and "rate" are used interchangeably in this Brief.

[13] While the court below stated (R. 659) that it did not reach the question of whether the Commission must fix the initial rate "when its inquiry demonstrates that there is a substantial question of the reasonableness of that initial rate," the opinion, as

The Commission in the instant case made no finding that the initial price was just and reasonable. Nor did the Commission make a finding that the initial price was unjust and unreasonable. In essence, what the Commission found was that the record did not show whether the initial price of 21.4 cents was or was not just and reasonable (R. 487). It granted the certificates applied for, but simultaneously instituted an investigation under Section 5(a) of the Natural Gas Act into the justness and reasonableness of the 21.4-cent price (R. 487-488). If the Commission is *required* in every producer certificate case to make a finding as to the justness and reasonableness of the initial price, it is apparent that the Commission did not meet that requirement in the order here involved. On the other hand, if such a finding is not required in a producer certificate case, then, we submit, the only pertinent question is whether the Commission abused its discretion when it declined to condition the certificates on a lower initial price, but left for determination in a full rate investigation under Section 5(a) of the Act, the question of the justness and reasonableness of the initial price.

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we construe it, leads to the inevitable conclusion that the justness and reasonableness of the initial rate is one of the elements which the Commission must consider in determining whether or not a certificate should be issued. We respectfully submit that if the level of the initial rate must be considered, it cannot be so considered unrelated to the question of justness and reasonableness. Were it otherwise, the court below would have had to affirm the order involved inasmuch as it is apparent from that order that the Commission *did* consider the level of the initial rate and made the determination that the sale should be authorized *at that rate* (R. 487).

A. The Natural Gas Act Does Not Require a Finding of Justness and Reasonableness of Initial Rates in Certificate Cases

1. Section 7(e) of the Natural Gas Act provides in pertinent part that:

> "* * * a certificate shall be issued to any qualified applicant therefor, * * * if it is found that the applicant is able and willing properly to do the acts and perform the service proposed and to conform to the provisions of the Act * * *, and that the proposed service, sale, * * *, is or will be required by the present or future public convenience and necessity; * * *."

Had Congress intended that the Commission find that the proposed initial price was just and reasonable before issuing a certificate, it could easily have included such a requirement in Section 7(e).[14] While there is no mandatory requirement in Section 7(e) that the Commission make a finding that the initial price is just and reasonable before issuing a certificate, no contention is made here that the Commission lacks authority to inquire into the level of the initial price. Concededly, the Commission has such authority and has, in fact, made such inquiry in numerous pipeline certificate cases. But, the fact that the Commission has authority to inquire into the level of the initial price in a certificate case does not mean that the Commission *must*, if the justness and reasonableness of the price is challenged, inquire into the price and make

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[14] As originally enacted, Section 7(c) of the Natural Gas Act required the Commission to consider the level of the initial rate, "it being the intention of Congress that natural gas shall be sold in interstate commerce * * * at the lowest possible rate consistent with the maintenance of adequate service in the public interest" (52 Stat. 825 (1938)). This language was omitted in the 1942 amendment (56 Stat. 83, 84 (1942)).

findings as to the justness and reasonableness thereof. *Florida Economic Advisory Council* v. *Federal Power Commission*, 251 F. 2d 643, 646 (D.C. Cir., 1957), *cert. denied*, 356 U.S. 959 (1958); *Oklahoma Natural Gas Company* v. *Federal Power Commission*, 257 F. 2d 634, (D.C. Cir., 1958), *cert. granted*, 79 S. Ct. 117 (1958); *cert. dismissed*, February 20, 1959.

It cannot be gainsaid that the rate standard of the Natural Gas Act, as reflected in Sections 4(a) and 5(a) thereof, is justness and reasonableness. But that is not to say that *findings* as to justness and reasonableness must be made before a rate is permitted to become effective. Were such findings mandatory, the Commission would be required to suspend each and every change in rate filed by a natural-gas company, and determine the justness and reasonableness thereof before permitting that changed rate to be collected without an undertaking to refund such portion thereof as may later be found unjustified (Section 4(e)). Section 4(e) of the Act, however, clearly makes the suspension of rates *discretionary* with the Commission. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 338, 76 S. Ct. 373, 377-8 (1956).

Indeed, if a finding of justness and reasonableness is a mandatory requirement under Section 7(e) of the Act, then the imposition by way of a certificate condition of a lower initial price would appear to be unlawful, unless the Commission were able to find from the evidence that such lower initial price itself was just and reasonable. At no time during the course of this proceeding before the Commission or the court below, did the Respondents submit any proof or make any contention that a finding of justness and reasonableness could be made with respect to any of the lower

prices which they urged the Commission to adopt by way of a certificate condition.

2. Were the Commission required to make findings as to the justness and reasonableness of the initial prices in producer certificate cases, it would inevitably result in the bogging down of the Commission's producer licensing functions into a morass of certificate cases turned into *de facto* rate proceedings. The Commission has recognized this fact and, with one exception,[15] has consistently refused to resolve rate issues in producer certificate cases. *In the Matter of Anthony J. Tamborello, et al,* (Opinion 287), 11 P.U.R. 3d 413 (1955); On rehearing, 15 F.P.C. 1 (1956), 12 P.U.R. 3d 219; *In the Matter of Atlantic Refining Company,* 15 F.P.C. 665 (1956); *In the Matter of Seaboard Oil Co., et al,* 19 F.P.C. 416, 421 (1958), 23 P.U.R. 3d 1.

In the *Tamborello* case, *supra,* several intervenors urged the Commission to deny the certificates applied for unless the applicants proved that the initial prices to be paid under the contracts were reasonable. In

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[15] Re *Cities Service Gas Company and Signal Oil and Gas Company,* 12 P.U.R. 3d 3 (1955), *aff'd Signal Oil and Gas Company* v. *Federal Power Commission,* 238 F. 2d 771 (3d Cir., 1956), *cert.* denied 353 U.S. 923 (1957). The Commission in the *Signal* case conditioned the certificate on the filing of a rate of 10¢ in lieu of the 12¢ rate agreed upon by contract. The rate condition was imposed in that case because the 12¢ price proposed would have caused a general area price increase for all major sales to 12¢ per Mcf. Since gas in the area was being sold to intrastate pipelines, and since the price of intrastate gas could not be controlled by the Commission, it included the aforementioned condition to forestall price increases to intrastate pipeline companies (12 P.U.R. 3d, at p. 13). The CATCO gas, however, is located in a new producing area and, accordingly, the initial price could not cause a general area price increase (R. 43a-44a).

rejecting this request, the Commission stated (11 P.U.R. 3d, 413, 417):

> "However, because the economic and other conditions presented in certificate applications filed by independent producers are substantially different from those presented in certificate applications filed by interstate pipeline companies, the Commission has not deemed it prudent to expend the time required to resolve rate issues at this stage, nor has it found it practical to inquire into the reasonableness of producer rates in all producer certificate proceedings. In the order below which we are adopting, paragraph (1) is a standard reservation of the Commission's unquestioned right under the Act, upon its own motion or upon proper complaint, to inquire later into the reasonableness of the rates proposed to be charged by the producers. Thus, the interests of the distribution companies and the consumers are protected against unlawful rates. At the same time, this procedure permits the more efficient and rapid handling of producers' certificate applications without the complicating consideration of the producer rates."[16]

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[16] On rehearing, the Commission reaffirmed the position taken by it in Opinion 287 and stated (Opinion 287-A, 15 F.P.C. 1, 3; 12 P.U.R. 3d 221-2):

> "Adoption of the contentions of applicants for rehearing would require that prior to issuance of any certificate of public convenience and necessity authorizing the sale of natural gas in interstate commerce for resale we enter upon the equivalent of a complete section 5 investigation and, on the basis of the evidence adduced, determine the 'lowest reasonable rate.' The rate so determined would then be imposed by a condition attached to the certificate. Such holding would not only be contrary to the plain language of the act but would also prevent us from exercising the judgment and discretion delegated to us by Congress. Reasonable regulation of natural gas companies, whether interstate pipeline transmission companies or independent producers, requires that our

In the recent *Seaboard* case, *supra*, the Commission discussed at length its reasons for refusing, except in extraordinary circumstances, to impose rate conditions in producer certificate cases. It pointed out that:

> "From the beginning of the Commission's regulation over independent producers after the Supreme Court's decision in the Phillips Petroleum Company case in 1954,[4] we have been seriously concerned with assuring that, in the interest of the ultimate consumer of natural gas, certificates of public convenience and necessity authorizing sales by independent producers be issued at prices which were fair and not excessive. In pursuit of this objective, we have proceeded along two avenues. First, we have in many instances issued certificates while simultaneously entering on an investigation of the price of the proposed sale under Section 5(a) of the Act. Second, we have in other instances set certificate proceedings for formal hearing in order to determine if there was any substantial evidence to justify imposition of a rate condition, although in only one instance, the Signal Oil case, have we found sufficient evidence to justify the imposition of such a condition.[5]" 19 F.P.C. at p. 420-1, 23 P.U.R. 3d at p. 8.

"[4] *Phillips Petroleum Company* v. *Wisconsin*, 347 U.S. 672.

"[5] But see the CATCO case, Docket No. G-11024, 17 F.P.C. 732, where we imposed such a condition in our order of May 20, 1957, but upon more mature and careful consideration found by our order of June 24, 1957, 17 F.P.C. 880, that considering all matters which enter into a determination of the public convenience and necessity that the condition should be removed, the sales of gas certificated, and Section 5(a) proceedings instituted to determine the justness and reasonableness of the rates."

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decisions and determinations be the result of a conscientious appraisal of evidence adduced, having regard for the interest of all who may be affected thereby and our determination of the requirements of public convenience and necessity in the circumstances."

From the foregoing it is clear that the failure of the Commission to make findings as to the justness and reasonableness of the initial rate in the order here involved is consistent with the established policy of the Commission in producer certificate cases. In the words of the Commission:

> "Time and experience have attested to the soundness of our position in the Tamborello case and have forcibly demonstrated at least in the great majority of independent producer certificate cases coming before us, where the price for the proposed sale has been arrived at on an arm's-length basis, that the imposition of a rate condition under Section 7(e) reducing the price proposed by the applicant for its sale of gas is neither a proper nor practicable means for protecting the consumer against prices which may not have been shown to be just and reasonable; and that the primary instrument for the protection of the consumer against excessive rates is and must continue to be the means afforded by the rate provisions of the Act." 19 F.P.C., at p. 421, 23 P.U.R. 3d, at p. 8.

B. The Commission Did Not Abuse Its Discretion in Issuing the Certificates

1. In the instant case, as is the case in many other producer certificate cases, the Commission was confronted with a very practical problem, namely, the urgent need by consumers for additional gas—particularly an amount as large as that involved in the CATCO reserves (R. 487). It was, of course, aware of the fact that the 21.4-cent price was higher than the price being paid by Tennessee under its other gas purchase contracts. But that fact alone does not mean that the price is excessive (R. 487-488). Faced with the fact that the gas would be lost to the interstate market, the Commission, in its informed judgment,

decided to permit the CATCO companies to charge the 21.4-cent price until such time as it could determine, in a full fledged rate investigation, whether or not that price was too high (R. 487-488). As noted above, the 21.4-cent price was made the subject of simultaneously-instituted Section 5(a) rate investigations, and those investigations are now in progress.

It may be contended that because of the crowded condition of the Commission's calendar and because of the complexities involved in rate-making, it takes a substantial length of time before a Section 5(a) proceeding is concluded and a decision reached by the Commission. The short answer to such a contention is that it would take just as much time and the issues would be just as complex if the determination of the justness and reasonableness of initial rates were to be attempted in producer certificate proceedings. To be sure, in pipeline certificate cases, inquiry into the justness and reasonableness of the initial rates is made by the Commission. But new pipeline certificate cases are extremely few in number. Producer certificate cases, however, can be numbered in the thousands since this Court's decision in the *Phillips* case, *supra*. (See F.P.C. Release No. 10183, issued December 8, 1958) Additionally, the Commission has, through the years, developed standards and criteria by which to measure the justness and reasonableness of pipeline rates. No such standards or criteria have as yet been developed in the independent producer field, although the Commission is struggling with that industry-wide problem now.

It may also be contended that Section 5(a) proceedings do not afford adequate protection to the consumer interest because Section 5(a) orders have only prospec-

tive effect, and, therefore, the amount of any excess in price paid in the interim would not be subject to refund. But this situation would only eventuate in the event the initial price is, in fact, unjust and unreasonable. There is no evidence in this record that such is the case (R. 487). Even assuming, however, that the 21.4-cent price is ultimately found to be unjust and unreasonable, that is a possibility which the Commission necessarily considered in connection with the order here involved. Obviously, it determined that such possibility was outweighed by the desirability and necessity of obtaining the CATCO gas for the interstate market (R. 487-488). Its determination, we submit, was based on a conscientious appraisal of the interests of *all* who would be affected thereby. Thus, the Commission said (R. 487):

> "* * * We are of the opinion that, in the circumstances of this case, in view of the great demand for gas by customers of Tennessee Gas, the price consideration should not be made the prime determinant of what the public convenience and necessity require. By virtue of the authority conferred upon us by Sections 4 and 5 of the Natural Gas Act and the proposal to modify the contracts made by the CATCO companies, we are of the opinion that we will be able to adequately protect the public interest with respect to the matter of price. * * *"

Only if the Commission acted arbitrarily, would Courts be justified in overturning the decision. *Ayrshire Collieries Corp.* v. *U.S.*, 335 U.S. 573, 69 S. Ct. 278 (1949); *Radio Corp. of America* v. *U.S.*, 341 U.S. 412, 71 S. Ct. 806 (1951); *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 232 F. 2d 467, 473 (3d Cir., 1956); *Charleston and Western Carolina Ry. Co.* v. *F.P.C.*, 234 F. 2d 62, 64 (D.C. Cir., 1956).

2. In many pipeline and producer certificate cases, time is either of the essence or is extremely important to the applicant as well as the distributor who is to receive the gas from the pipeline company. For example, gas leases contain provisions for the payment of "shut in" royalties unless the gas is produced and marketed as rapidly as is reasonably possible in accordance with state conservation laws. The need for capital to further develop a lease presents in many cases, an impelling need to obtain an immediate sale of gas from wells already completed. Many leases contain provisions permitting the lessor to cancel the lease unless the gas is marketed within a specified time. See *In the Matter of Seaboard Oil Co., et al, supra,* 19 F.P.C. 416, 421, 23 P.U.R. 3d 1, 9. Indeed, in the instant case, the leases held by the CATCO producers would have been in jeopardy unless production commenced in 1958 (R. 26a-27a, 78a).

3. The importance of expedition in producer certificate cases was succinctly stated by the Commission in the *Seaboard* case, 19 F.P.C., at p. 422, 23 P.U.R.-3d, at p. 9:

> "Had the issue of initial price not been considered in this proceeding, the certificate would have been issued more than a year ago. This unavoidable administrative delay, due to the raising of the initial price issue, has resulted in these properties making no return on their investment for a year, which expense must, of course, be ultimately borne by the consumer. In addition, * * * it is apparent that if there are to be delays like this in future producer cases, pipeline companies otherwise in a position to take immediate delivery of gas may lose a bargaining advantage they now possess as producers will hesitate to make concessions in price in the expectation of early deliveries, and the con-

sumer will ultimately pay the addition to the price."

Tennessee has a vital interest in the expedition of producer certificate cases. Tennessee, as well as most other pipeline companies, is constantly seeking to acquire additional gas supplies from independent producers. Such gas supplies are needed by the pipeline companies to augment their present supplies and to enable the pipeline companies to continue to expand in order to meet the constantly increasing needs of the markets. Orders for pipe must be placed with the mills several months in advance of the estimated date of delivery. Distributing companies must make advance plans to receive the additional gas. Considerable loss of time as well as money would necessarily be incurred by the delays which inevitably would result from turning producer certificate cases into *de facto* rate proceedings.

Tennessee has no desire to pay more than a just and reasonable price for the gas purchased by it. At the same time, it must be recognized, as pointed out above, that no criteria for determining justness and reasonableness of producer rates have been established. The natural gas industry cannot come to a standstill, however, while criteria are being developed. New pipelines must be built, older pipelines must expand. Natural gas is needed for both purposes. Yet, the building of new pipelines and the expansion of existing pipelines will most assuredly be delayed or come to a halt, if in each producer certificate case the Commission must determine the justness and reasonableness of the producer rates. It would be one thing if a rate, once permitted to go into effect, could not thereafter be reduced if such rate is found to be unjust and unrea-

sonable. It is quite another thing where, as is the case under the Natural Gas Act, the rate is always subject to reduction under Section 5(a) if it is, or becomes, unjust and unreasonable.

To summarize at this point, if it is not mandatory—as we contend it is not—for the Commission to make findings in producer certificate cases as to the justness and reasonableness of the initial price, then the order issued by the Commission was lawful, unless the Commission abused its discretion in granting the certificate. Under the circumstances involved, discussed in the Commission's order (R. 486-488), we submit that there was no abuse of discretion.

The law is well settled that where an administrative agency has a choice of remedies and selects one, that choice is not to be set aside merely because it is urged that another remedy might have been more appropriate. *General Protective Comm.* v. *S.E.C.*, 346 U.S. 521, 74 S. Ct. 261 (1954); *Franks Bros. Co.* v. *N.L.R.B.*, 321 U.S. 702, 64 S. Ct. 817 (1944); *Cf. Jacob Siegal Co.* v. *F.T.C.*, 327 U.S. 608, 66 S. Ct. 758 (1946); *In re Standard Gas and Electric Co.*, 151 F. 2d 326 (3rd Cir., 1945); *Ayrshire Collieries Corp.* v. *U. S.*, 335 U.S. 573, 69 S. Ct. 278 (1949); *Radio Corp. of America* v. *U.S.*, 341 U.S. 412, 71 S. Ct. 806 (1951).

It is equally well settled that when Congress has entrusted an administrative agency with the responsibility of selecting or determining the means of achieving a statutory policy, the relation of remedy to policy is peculiarly a matter for administrative competence. *General Protective Comm.* v. *S.E.C.*, *supra*; *American Power and Light Co.* v. *S.E.C.*, 329 U.S. 90, 112, 67 S. Ct. 133, 146 (1946); *Halsted* v. *S.E.C.*, 182 F. 2d 660, 667 (D.C. Cir., 1950).

II.

THE UNWILLINGNESS OF AN INDEPENDENT PRODUCER TO ACCEPT A CERTIFICATE CONDITIONED ON A LOWER INITIAL PRICE FOR GAS THAN AGREED UPON BY CONTRACT DOES NOT DEPRIVE THE COMMISSION OF JURISDICTION TO CONSIDER FURTHER THE APPLICATION OF THE INDEPENDENT PRODUCER

As demonstrated under Section I above, a finding of justness and reasonableness of the initial rate is not required in order to grant a certificate under Section 7(e) of the Act. The court below, however, was of the view that if an applicant indicates in advance that he will not accept a certificate at a lower initial price than agreed upon by contract, he thereby ousts the Commission from jurisdiction to consider further the application involved (R. 662). We respectfully submit that this holding of the court below is in error, as is demonstrated below.

A. An Applicant Is Not Required to Accept the Certificate Proffered Him

1. There is no power in the Commission to compel a producer of gas to sell his gas in the interstate market. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Company*, 337 U.S. 498, 69 S. Ct. 1251 (1949); *Cf. The Central West Utility Company* v. *F.P.C.*, 247 F. 2d 306 (3d Cir., 1957). Every applicant for a certificate is, in essence, requesting a certificate exactly as set forth in his application. Implicit in every application is the understanding that unless the certificate issued is acceptable to the applicant, he will refuse to accept it and submit to the Commission's jurisdiction. It cannot be assumed that implicit in the act of filing an application is the willingness of the applicant to accept any certificate, regardless of the conditions contained therein, which may be issued by the Com-

mission. *Cf. Sunray Mid-Continent Oil Company* v. *F.P.C.*, 353 U.S. 944, 77 S. Ct. 792 (1957). This being so, we fail to see how the Commission's authority is circumscribed when an applicant advises the Commission at any stage of the proceeding as regards a condition which he considers non-acceptable. Indeed, the right of an applicant to refuse a certificate issued to him is recognized by the Commission's Rules and Regulations (18 C.F.R. 157.20(a)) which condition the validity of a certificate on acceptance by the applicant within 30 days from the date of issuance.

A conclusive refutation of the holding of the court below can be found in the legislative history of Section 7 of the Natural Gas Act. In the hearings on the 1942 amendment to Section 7 of the Act, the following colloquy took place between Representative South and Commissioner Manly:

* * * * *

"MR. SOUTH. I presume those certificates, as a general practice, are issued upon an application?

"Commissioner MANLY. Yes; invariably upon application.

"MR. SOUTH. As a practical matter, the authority given to the Commission here could be used—and I am wondering if it is generally used—for the purpose of broadening or extending the application in such a way as to better serve the public interest.

"Commissioner MANLY. That has been the case, I am sure, in the administration of all of the cases that have come before this Commission. It has been primarily this, sir; That a company, in making an application for a certificate, would set up a claim that it would do such-and-such things; that it would put a line in at such-and-such time;

that it would have such-and-such gas reserves; that it would charge such-and-such rates:

"MR. SOUTH. Or serve a particular section of the community sought to be served?

"Commissioner MANLY. Yes, sir; that it would serve a particular community, and so forth.

"Now, what the Commission does under ordinary conditions is to require those conditions to be set forth in the authorization for a certificate that is accepted by the company as a condition precedent to the actual issuance of the certificate, so that in all intents and purposes *the company has a right to reject a certificate containing any conditions which are unreasonable, onerous, or have no relevancy to the issue.*

"MR. SOUTH. That is what I have in mind. If they are too burdensome, then the application could be withdrawn.

"Commissioner MANLY. *They could come back before the Commission and ask for a rehearing if they regard the terms and conditions as being onerous.*" (Emphasis supplied. Hearings before House Committee on Interstate and Foreign Commerce on H.R. 5429, 77th Cong., 1st Sess. (1941) p. 23.)

The foregoing, we submit, conclusively demonstrates that the court below was in error in holding that the applicants circumscribed the scope of the Commission's inquiry by their refusal to accept a certificate conditioned on a lower initial rate. By the same token, the court below was equally in error in holding that the refusal ousted the Commission from jurisdiction to consider further the producer applications.

2. The court below was equally in error in holding that the "action of the applicants in curtailing the

decision-making power of the Commission demonstrates their unwillingness to conform to the provisions of the Act; this in itself would require a denial of the applications." First, as demonstrated below, the decision-making power of the Commission was not, in fact, curtailed by the applicants. The Commission was free, regardless of the stated position of the applicants, to consider the level of the initial price. Thus, assuming *arguendo* that a finding of justness and reasonableness of initial price is mandatory in a producer certificate case, the Commission was obviously free to determine whether or not the particular initial price was just and reasonable. Second, unwillingness to accept a certificate different from that applied for can hardly, in view of the Commission's own Rules and the legislative history set forth above, be construed as an "unwillingness to conform to the provisions of the Act."

B. The Commission Did, in Fact, Consider the Matter of Price

As previously noted, the court below held that the applicants limited "the scope of the inquiry which the Commission is required to make" thereby "curtailing the decision-making power of the Commission" (R. 658, 662). Since by that language the court below evidently meant that the Commission was thereby precluded from making findings as to the justness and reasonableness of the initial price, the obvious answer is that such findings are not essential in a certificate case, as demonstrated above. Moreover, the absence of such findings did not stem from the applicants' unwillingness to accept a lower initial price, but stemmed rather from carefully considered Commission policy, as attested by the *Tamborello* and *Seaboard* cases, *supra*.

If, on the other hand, the court below meant that he Commission gave no consideration to the questio f price, the court was in error. The Commission's rder, read together with the dissenting opinion of ommissioner Connole, demonstrates very clearly that areful consideration was given to the matter of price R. 484-497). Indeed, the principal matter discussed the Commission's order and in the dissent concerned he matter of price.

The holding of the court below, if permitted to stand, ill have extremely unfortunate consequences. It ould place difficult—if not insurmountable—obstacles the path of pipeline companies obtaining additional as supplies for the interstate market. Producers of atural gas obviously will be reluctant to apply for ertificates of public convenience and necessity if they ust—as the opinion of the court below would appear indicate—impliedly agree in advance to accept any ertificate issued by the Commission, regardless of ny conditions which might be imposed therein.

III.

HE COURT BELOW COMMITTED REVERSIBLE ERROR BY DECIDING SUA SPONTE A QUESTION NOT RAISED BY RESPONDENTS

The reversal of the Commission's order was based the stated ground (discussed in Section II above) at the Commission lacked jurisdiction to issue certificates in this case because the applicants had, by efusing to accept a lower initial price, circumscribed he scope of the Commission's inquiry, thus "requiring he Commission to forego the consideration of an elent which may be necessary in the formulation of its dgment" (R. 662).

Section 19(a) of the Natural Gas Act provides that as a condition precedent to invoking the review authority of the courts, a petitioner must first file with the Commission an application for rehearing setting forth the specific ground or grounds upon which such application is based. Section 19(b) of the Act provides that:

> "* * * No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. * * *"

The Respondents here, in their applications for rehearing before the Commission, urged various objections to the Commission's order. None, however, mentioned or alluded to any ground which could be construed as contending that the Commission lacked jurisdiction to entertain the applications or to issue the certificates involved (R. 447a-474a). Nor did any of the Respondents raise such an objection before the court below. Accordingly, the court below was precluded from deciding this case on a ground not urged before the Commission on rehearing. *Panhandle Eastern Pipe Line Co.* v. *F.P.C.*, 324 U.S. 635, 649-651, 65 S. Ct. 821, 828-9 (1945). The court below was also precluded from raising the matter *sua sponte*. *F.P.C.* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498-501, 75 S. Ct. 467, 471-3 (1955); *Cf. Halsted* v. *S.E.C.*, 182 F. 2d 660, 669-70 (D.C. Cir., 1950).

In summary, if this Court is of a different view than Petitioner as to the *sua sponte* nature of the decision of the court below, then we respectfully urge this Court to find that the Commission is not required

in independent producer certificate proceedings under Section 7(e) of the Natural Gas Act, to make findings as to the justness and reasonableness of the initial price; and that the refusal by an applicant to accept a certificate conditioned on a lower initial price does not defeat the jurisdiction of the Commission to consider further the application.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

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APPENDIX

The pertinent provisions of the Natural Gas Act of June 21, 1938, c. 556, 52 Stat. 821, as amended by Act of February 7, 1942, c. 49, 56 Stat. 83; 15 U.S.C. 717-717w, are as follows:

"Sec. 4.(a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

* * * * * * * *

"Sec. 4.(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders, with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service

shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to shew that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U.S.C. 717c (1946)]

* * * * * * *

"Sec. 5.(a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * * * *

"Sec. 7.(a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided*, That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers. [52 Stat. 824 (1938); 15 U.S.C. 717f (a) (1946)]

* * * * * * *

"Sec. 7.(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety

days after the effective date of this amendatory Act. Pending the determination of any such application the continuance of such operation shall be lawful.

"In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice of hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended. 56 Stat. 83 (1942); 15 U.S.C. § 717f (c) (1946)]

* * * * * * * *

"Sec. 7.(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require. [56 Stat. 84 (1942); 15 U.S.C. § 717f (e) (1946)]

* * * * * * * *

"Sec. 19.(a) Any person, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this act to which such person, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any order of the Commission shall be brought by any person unless such person shall have made application to the Commission for a rehearing thereon.

"(b) Any party to a proceeding under this act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the circuit court of appeals of the United States for any circuit wherein the natural-gas company to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be served upon any member of the Commission and thereupon the Commission shall certify and file with the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, or set aside such order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional

evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of the additional evidence so taken, and it shall file with the court such modified or new findings, which if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended * * * ."

* * * * * * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

Nos. 518 and 536

THE ATLANTIC REFINING COMPANY, *et al.*,
Petitioners,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *et al.*,
Respondents.

TENNESSEE GAS TRANSMISSION COMPANY,
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PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK.

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BRIEF FOR RESPONDENT PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK.

Opinions Below.

The opinion of the Court of Appeals for the Third Circuit (R. 653-662) is reported at 257 F. 2d 717. The opinion of the Federal Power Commission (R. 484-497) is reported at 17 F. P. C. 880; and its opinion on rehearing (R. 541-542) at 18 F. P. C. 169.

Jurisdiction.

The judgment of the Court of Appeals was entered on June 30, 1958 (R. 663). Petitions for rehearing were denied on August 27, 1958 (R. 667). The petitions for writs of certiorari in Nos. 518 and 536 were filed on November 14 and 24, 1958, respectively. They were granted (upon acquiescence of respondents) on January 12, 1959 and the cases consolidated (R. 669). The jurisdiction of this Court is invoked under 28 U. S. C. §1254(1) and §19(b) of the Natural Gas Act, 52 Stat. 831 (1938), 15 U. S. C. 717r(b).

Questions Presented.

In the context of the lapse of five years since this Court apprised the Federal Power Commission that the Natural Gas Act encompassed producer sales for resale in interstate commerce, with little or no progress in the interim toward ascertainment of "just and reasonable" producer rates under Sections 4 and 5, and with concomitant phenomenal increases in both the demand for natural gas and the negotiated prices for the product at the wellhead:

1. Does the applicant in a producer-sale certificate proceeding under Section 7 of the Natural Gas Act have the burden of proving that public convenience and necessity require the sale?

2. Is not the initial price proposed a vital element of that statutory standard and that burden of proof?

3. Does the applicant adequately meet that standard and discharge that burden by proving merely (1) the existence and validity of the contract of sale and (2) its negotia-

tion in arms'-length bargaining—and nothing more—when cross-examination develops (a) that the initial price proposed exceeds any ever certificated in the area of the sale, and (b) that the initial price proposed will increase the pipeline purchaser's gas acquisition costs considerably?

4. Does the producer-applicant absolve himself of his burden in this respect by (a) showing that the pipeline purchaser needs (or can transmit and sell) more gas and (b) threatening to (or permitting others to represent that he will) withhold his gas from the market unless he receives a certificate upon his own terms?

5. In acting upon a producer-sale certificate application under Section 7 of the Natural Gas Act, is not the Federal Power Commission required to consider the initial price proposed?

6. In order to certificate such a sale unconditionally must not the Commission find and determine that public convenience and necessity require the sale at the initial price proposed?

7. May the Commission certificate such a sale unconditionally when the proof demonstrates (1) the existence and validity of the contract of sale and (2) its negotiation in arms'-length bargaining, but also shows (a) that the initial price proposed exceeds any ever certificated in the area of the sale and (b) that the initial price proposed will increase the pipeline purchaser's gas acquisition costs considerably?

8. Under the circumstances enumerated in question 7 *supra*, may the Commission leave untouched its twice-made findings that public convenience and necessity do not

require unconditional certification of the sale at the initial price proposed and then proceed to grant such a certificate simply because (1) the pipeline purchaser needs (or is presumed to need) more gas and (2) the producer-applicant threatens (and is presumed to be serious) to withdraw his application and his gas unless he gets from the Commission exactly what he wants?

9. Is not pursuit of the latter course by the Commission in excess of its statutory authority and may not the Court below so hold when considering a petition ascribing to the Commission the commission of grievous error of law?

Statement of the Case.

Introduction.

The proceedings below were instituted by the Public Service Commission of the State of New York, and jointly by Long Island Lighting Company and Public Service Electric and Gas Company, pursuant to Section 19(b) of the Natural Gas Act, to review and set aside a final determination and order of the Federal Power Commission made on June 24, 1957 in its consolidated proceedings entitled, respectively, "*In the Matters of Continental Oil Company,* Docket G-11024, *Atlantic Refining Company,* Docket G-11034, *Cities Service Production Company,* Docket No. G-11046, and *Tidewater Oil Company,* Docket G-11049."

Continental Oil Company, The Atlantic Refining Company, Cities Service Production Company and Tidewater Oil Company (hereinafter called the "CATCO applicants"), petitioners before this Court, are independent natural gas producers extensively engaged, among other things, in the production and sale of natural gas in and offshore the coast of the State of Louisiana. They are holders of permanent unconditional certificates of public

convenience and necessity for the instant gas sales, issued by the Federal Power Commission (hereinafter called "the FPC" or "the Commission") pursuant to its order of June 24, 1957.

Petitioner Tennessee Gas Transmission Company (hereinafter called "Tennessee") is a gas transmission company engaged in the transportation and sale for resale in interstate commerce of natural gas from southwestern areas of the United States to the northeastern states. It is an important supplier of natural gas to distributors in New York State, through sales directly to some and indirectly to others.

Respondent Public Service Commission of the State of New York is a commission created and existing under the laws of the State of New York. It is directed and authorized by Article IV of the New York Public Service Law to exercise general regulatory supervision over gas corporations in the State of New York, including supervision over the rates and charges of said companies. In the discharge of its official duties under that statute (Section 12) it has intervened and participated in numerous producer certification proceedings before the Federal Power Commission involving proposed sales of natural gas which would be transported, resold and ultimately consumed in New York State or which, though destined for other markets, would affect the price of gas so transported, resold or consumed.

The CATCO Applications.

By applications filed with the Federal Power Commission during the first half of September, 1956, the CATCO producers applied for certificates of public convenience and necessity under Section 7(c) of the Natural Gas Act, 15 U. S. C. §717f(c), to sell to Tennessee approximately

240,000 Mcf of natural gas per day from leases located in the Gulf of Mexico, offshore the coast of Cameron and Vermilion Parishes, Louisiana, pursuant to contracts executed during August, 1956.

The prices contained in each of the four contracts and proposed by each of the four producers in their applications for certificates of public convenience and necessity, begin at 22.4¢ per Mcf and are to ascend, by periodic increases of 2¢ every four years, beginning in 1962, to a terminal price in 1986 of 35.4¢ per Mcf (CATCO Exh. Item A, R. 286a-328a, 310a-311a, R. 19a). As thus proposed, the initial contract price was higher and the periodic increases were steeper than those of any previously certificated sale by any producer to any pipeline company in the entire Southwest. That initial price exceeded the highest previously certificated price by 1.4¢ per Mcf; the highest price currently paid by Tennessee by 4.4¢ per Mcf; and, by some 10¢, the average cost to Tennessee of all the gas it had previously contracted to buy.

The New York Commission and several distributing company customers of Tennessee (including respondents herein, Long Island Lighting Company and Public Service Electric and Gas Company), and Tennessee itself intervened in the consolidated proceedings involving the CATCO applications (R. 329a, 330a-331a). Except for Tennessee which, as a party to each of the four underlying contracts, indicated that it would support the producers' applications, all of the intervenors asserted that they were opposed to the issuance of unconditional certificates to the applicants at the proposed contract prices. In this, they were prompted by the absence of any demonstration whatever in justification of those prices or showing that they were reasonably in the public interest or that the sales at that

price level were required by public convenience and necessity (R. 10-16, 642-649, 650-657, 658-663, 669, 685-693).*

The Hearing.

The hearing on the CATCO applications was held on February 28, 1957 and concluded the following day. This short, perfunctory performance (327 pages of testimony and 6 exhibits) elicited little information of value in resolving the important questions of public interest involved in the applications. No evidence whatever was adduced to justify, rationalize or even explain the proposed prices—except evidence that Tennessee had to go that high to outbid several competing, would-be purchasers, in a sellers market (R. 42a). On the contrary, Tennessee's witness, Mr. Witmer, on cross examination admitted that they were unprecedentedly high; that the initial price of 22.4¢ per Mcf was higher (and the periodic increases steeper) than

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* Concurrently, by application dated September 19, 1956, Tennessee also applied to the Commission for a certificate of public convenience and necessity, pursuant to Section 7 of the Natural Gas Act, for authority to institute a large pipeline construction program to expand the capacity of its transmission system. It was for the specific purpose of this contemplated expansion that Tennessee contracted with the CATCO applicants for the acquisition of the gas to be supplied under the contracts involved in this case (R. 46). Included in that application was Tennessee's request for authority to construct 107 miles of pipeline to gather the CATCO gas from the offshore drilling platforms to its main pipeline system at Kinder, Louisiana, at a cost of over $16 million. The onshore line comprises 46.4 miles; offshore, 60.8 (R. 46a; cf. Tenn. Br., p. 5).

By an order issued March 29, 1957, the Commission denied a motion by the New York Commission to consolidate Tennessee's application (Docket No. G-11107) with the CATCO applications (R. 764-7). By another order issued on the same date, however, the Commission consolidated the Tennessee application with some 19 other dockets unrelated to the CATCO sales. *Matters of American Louisiana Pipeline Company, et al.*, Docket Nos. G-2306, *et al.* The hearing in those consolidated matters did not commence until May 14, 1957. That proceeding terminated with the issuance of a permanent certificate, substantially as Tennessee had requested, on January 28, 1959.

in any other gas purchase contract of Tennessee (R. 238-239). The highest price Tennessee was then paying in the entire Southwest was 18¢ per Mcf (R. 254). The witness did not know of any certificated sale at as high a price as that called for by the CATCO contracts (R. 252-253). Indeed, the actual cost of this gas to Tennessee would be far more than the wellhead price of 22.4¢ per Mcf, since the additional cost of bringing the gas into the Tennessee system would have to be included, i.e., the annual return, tax on return, and depreciation applicable to the 107-mile gathering pipeline system Tennessee was to construct at a cost of over $16 million (R. 266). Rudimentary mathematical computation of this additional cost would add 3 to 4¢ per Mcf to the contract price. Tennessee's witness testified that the purchase of this gas would "only" increase Tennessee's average cost of gas from 12.73¢ to 13.70¢ per Mcf (R. 52)—but he refused to divulge the working papers by which he arrived at this conclusion and the examiner declined to direct their production (R. 240).

The Decision of the Presiding Examiner.

On March 29, 1957, the presiding examiner rendered his intermediate decision (R. 742-762). He completely rejected —erroneously, as the Commission itself later held—the contentions of intervenors that the requested certificates should not be issued, absent proof that the sales at the proposed high prices were in the public interest, except upon condition that the initial price be reduced to some less disruptive level. Completely misconceiving the incidence of the burden of proof, the examiner stated in substance that since the *intervenors* had not established that the proposed prices would *necessarily* result in a rate

increase filing by Tennessee,* and that some other price would be more appropriate, the sales should be authorized without further ado (R. 756-760).

However, the examiner was clearly troubled by the absence of any evidence concerning Tennessee's need for this tremendous supply of gas. He specifically pointed out that:

> "Tennessee's purpose was to obtain gas reserves to supply the expansion of Tennessee's market as shown in Tennessee's pending application in Docket G-11107. None of the data which it is *assumed* was filed in support of such application is in evidence in this proceeding." (R. 754, emphasis added.)

While recognizing that, in general, the demand for gas was high, in relation to its supply, he emphasized that the "facts of this proceeding indicate that these reserves are important to Tennessee's *expansion* . . ." but pointed out that "any finding to the effect the public convenience and necessity requires or will require the issuance of certificates to Applicants in *this* proceeding would be confronted with the fact that a contrary finding made with respect to Tennessee's application for a certificate which is pending in Docket No. G-11107 would be in conflict as Tennessee proposes to use the reserves which are the subject of this proceeding in connection with its *expansion program* which is the subject of its application in G-11107." (R. 760, emphasis added.) Accordingly, he qualified and condi-

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* Almost immediately after the certifications herein, Tennessee included the prospective cost of CATCO gas in an unsuccessful attempt to settle its then pending rate case (Docket No. 11980). Upon expiration of the Section 4 suspension period (May 15, 1959) Tennessee will commence collecting increased rates from its customers based directly thereupon (Docket No. G-17166). Cf. R. 43, 202 and CATCO Br. pp. 29, 31.

tioned his findings and order "upon a certificate being issued to Tennessee in G-11107 . . ." (R. 760).*

The New York Commission and other intervenors promptly filed exceptions to the neglect of the examiner to recommend the imposition of further conditions relating specifically to the matter of initial price (R. 768-788, 789-806, 813-822, 829-833).

The Commission's Order of April 22, 1957.

By its first determination and order in this case, the Commission completely reversed the decision of its presiding examiner with reference to the price considerations involved in the CATCO applications. Holding squarely, and properly, that "this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest" (R. 835)—the Commission further said:

> "The record contains insufficient evidence or testimony, however, on which to base a finding that the public convenience and necessity requires the sale of these volumes of gas at the particular rate level here proposed. The importance of this issue in certificating this sale cannot easily be overemphasized. This is the largest reserve ever committed to one sale. This is the first sale from the newly developed offshore fields from which large proportions of future gas supplies will be taken. This is the highest price

* On the same day that the examiner's report was issued, the Commission granted Tennessee a temporary certificate for facilities covered by its application in Docket No. G-11107, but specifically excluding the 107 miles of pipeline which Tennessee was to construct to bring the CATCO gas ashore (R. 836, n. 1). Thus, the Commission, without a hearing in Tennessee's Docket No. G-11107 (no hearing being required for the issuance of a temporary certificate) and wholly independent of any of the issues, including price, involved in the pending CATCO applications, certificated expansion of Tennessee's plant capacity, which expansion was designed in major part to enable it to carry this additional and other large volumes of gas

level at which the sale of gas to Tennessee Gas has been proposed."

"Those factors make it abundantly evident that, in the public interest, this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest" (R. 835).

The Commission then proceeded to misconstrue the decision of the presiding examiner with reference to the matter of Tennessee's need for gas. It stated, incorrectly, that the examiner "has found there is a need for those volumes of gas on the system of Tennessee Gas" which finding the Commission "adopted" (R. 836)—whereas the examiner had actually found that the gas *presumably* would be needed, *only* if the Commission authorized Tennessee's proposed expansion of the capacity of its system in Docket No. G-11107. Thus, the Commission "adopted" a finding which the examiner *had not made*, and which was *not* supported by the record in this case (and could not have been supported by the record in Docket G-11107 either, since none had then been compiled), *i.e.*, "a need for those volumes of gas on the system of Tennessee Gas" (R. 836).

Based upon that finding, the Commission directed the issuance of *temporary* certificates to the CATCO applicants but remanded the proceeding to the presiding examiner, "to determine at what rates the public convenience and necessity requires these sales to be made if permanent certificates are to be granted to these companies upon final disposition of their applications" (R. 836). The order specifically imposed the burden of proof and the burden of going forward with the presentation of evidence upon remand, upon CATCO and Tennessee (R. 838).

Simultaneously, the Commission abstracted from Tennessee's pending application (Docket G-11107) that part

thereof which related to the construction of the proposed gathering pipeline system between the offshore platforms and its main line at Kinder, Louisiana, and granted a temporary certificate to Tennessee to construct and operate that 107 miles of line (R. 838).

The CATCO Motion for Modification.

Supported by Tennessee, the CATCO applicants moved for rehearing of the order of April 22, 1957 (R. 851-863, 896-901), asserting that the "economic risk" to which they would be exposed (the exact nature of which was not elaborated upon) would "foreclose" their acceptance of temporary certificates (R. 854).

> ". . . They say further that they could not present sufficient evidence at the hearing contemplated by the Commission's order within any reasonable period in the future and could not afford to commence construction until at least the initial rate question is resolved" (R. 904).

As an inducement to the Commission to rescind its order of remand and to issue permanent and unconditional certificates, the CATCO applicants offered to modify slightly the contracts of sale, *but not as to the initial price of 22.4¢ per Mcf.**

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* The proposal related to the so-called Harris Bill then pending before Congress (H. R. 6790, 85th Congress) which, if enacted, would have excluded from the Commission's supervision the contract clauses calling for *definite* fixed price increases. The CATCO applicants proposed to amend the contracts to make the price increase clauses *indefinite*, so that, if the Harris Bill were enacted, future increases would be governed by "reasonable market price" as determined by the Commission under the terms of the Harris Bill, thus assuring the Commission continuing jurisdiction, of a sort, over the price of future, i.e., post-1962 deliveries (R. 857-8). Contrary to Tennessee's assertion herein (Br., p. 4, ftn. 5), this gesture in no way "alleviated" the concern of *this* respondent pertaining to the future price escalation provisions.

The Commission's Order of May 20, 1957:

The Commission's second order (R. 903-9) was unique. It did not retract one whit from its prior determinations: (1) that the proposed sales should not be certificated in the absence of proof that the initial price was in the public interest and, in fact, reiterated (2) that "the record does not contain sufficient evidence on which to base a finding that the public convenience and necessity requires the sale of the gas at that particular rate level" (R. 904).

Instead, the Commission adopted a procedure which would have deferred price considerations to a subsequent rate increase proceeding, to be instituted pursuant to Section 4 of the Natural Gas Act, in which the burden of proof would have been upon the CATCO companies to establish that the price of 22.4¢ per Mcf was just and reasonable, failing which they would have been required to refund excessive sums collected—(rather than a proceeding under Section 5 of the Act, in which the Commission itself would have the burden of establishing that the existing rate was *not* just and reasonable, upon demonstration of which there would be no recoupment of past excessive exactions).

The scheme contained in the May 20 order was this: the Commission's April 22 order, including the remand of the proceeding to the presiding examiner, was abrogated. Permanent certificates were authorized, upon condition that the CATCO proposals be amended to provide (1) for an initial price of 18¢ per Mcf—the highest price then being paid by Tennessee; (2) that CATCO should be permitted to file for a *rate increase* to 22.4¢ per Mcf to be effective *one day* after commencement of delivery of gas to Tennessee; (3) such increased price would continue until November 1, 1962, unless changed by the Commission in a Section 4 rate proceeding to be instituted upon that rate

increase filing; and (4) indefinite pricing clauses should govern any price increases on and after November 1, 1962—and the Commission, on its part, "assured" the CATCO applicants that it would *limit any suspension* of the 22.4¢ rate increase filing to a *period of 24 hours!*

The effect of the May 20 order would have been to permit the CATCO applicants to collect the originally proposed contract price of 22.4¢ per Mcf (except for the first day's deliveries and the succeeding one-day suspension thereof) but, to require them, under Section 4 of the Natural Gas Act, to establish that such price was just and reasonable, and, failing that, to refund to Tennessee (and thereby, in effect, to the consuming public) any unjustified amounts collected in excess of 18¢ per Mcf. Thus, as Commissioner Connole later put it, the Commission "made unprecedented efforts to ensure fair treatment . . . [and] clearly evidenced our intention to cooperate in arriving at an initial price level that would be just and reasonable to all parties affected" (R. 930).*

The Tennessee Application for Rehearing.

On June 3, 1957 Tennessee, but not the CATCO applicants, filed an application for rehearing and reconsideration of the Commission's May 20 order (R. 910-17). This petition also was unique. It expressly stated that it was "not the purpose of this application to reargue the question of the legality of the Commission's order. . . . Rather it is our purpose here to inform the Commission of recent developments . . ." (R. 911-12). These were stated as follows:

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* Actually, the 18¢ per Mcf. rate level has never been determined to be "just and reasonable" and is, in fact, the subject of potential inquiry in pending Section 4 and Section 5 proceedings. See *infra*, pp. 26-28.

"Tennessee has been definitely advised by the producer-applicants that they will not amend Section 10 of the contract so as to change the initial rate from 21.4 cents [ex-tax] per Mcf to 17 cents [ex-tax] per Mcf. Tennessee has been further informed by the producer-applicants that the certificates issued by said order will not be accepted by them for that reason, and that, accordingly, the contracts will be terminated" (R. 912).

The So-Called "Rehearing".

On June 6, 1957, the Commission purported to grant a "rehearing" (R. 920). In fact, no further hearing or "rehearing" was held—no additional evidence whatever was ever added to the original record. Instead, the Commission merely directed oral argument by counsel for the respective parties, to be heard on June 12, 1957. On that occasion, the CATCO attorneys equivocated and vacillated like the four winds when pinned down on the point, but *implied* the sincerity of their client's purported threats to terminate the contracts. No witness was called and sworn to testify to the threats or to explain what was to be done with this tremendous quantity of gas if the threats were carried out—or, in other words, that the threat actually could and would be carried out. Thus, the Commission's quasi-judicial administrative proceeding was permitted to degenerate into a poker table discussion at which pure bluff was permitted to supplant the public interest as the subject matter of the case.

The Commission's Order of June 24, 1957.

The bluff worked. On June 24, 1957, the Commission by a 3 to 1 vote (Chairman Kuykendall not voting) issued the order under review herein (R. 923-9). It accepted the

unsupported CATCO bluff-threat as reality—not in the sense that it actually could and would be carried out, but that the CATCO applicants "would *seek* to dispose of their gas elsewhere than to Tennessee Gas and the interstate market" (R. 925, emphasis added), with success of the effort being assumed.

Thus, the Commission threw in its hand, "modified" its May 20 order and granted permanent certificates approving the sales "without any condition affecting the initial price of 21.4 cents [ex-tax] per Mcf"—reporting to be motivated solely by (1) the bluff-threat and (2) "the great demand for gas by customers of Tennessee" (R. 925). In so doing, the Commission completely overlooked the fact that there had been *no showing whatever in this or any other record before it* of any need (great, supervening or other) by Tennessee or the consuming public for this gas at the unprecedentedly high price of 22.4¢ per Mcf.

The mistaken rationale for the Commission's final action in this case is contained in the following few sentences of its June 24 order:

> ". . . In reaching a solution of this problem we are moved by the primary consideration that the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas. Further, it appears to us, important as is the issue of price, that as far as the public is concerned, the precise charge that is made initially is less important than the assurance of this great supply of gas. In view of these circumstances and the fact that the record does not show that the 21.4-cent rate [ex-tax] is necessarily excessive, we agree with the presiding examiner that this certificate proceeding under Section 7 of the Natural Gas Act should not assume the character of a rate proceeding under Section 5(a). We are of the opinion that, in the circumstances of

this case, in view of the great demand for gas by customers of Tennessee Gas, the price consideration should not be made the prime determinant of what the public convenience and necessity require" (R. 925).

Having so thrown in its hand, the Commission held out one card for what it might be worth—rate investigations under Section 5 of the Act, under which the burden would be upon the Commission to establish that the 22.4¢ rate was unreasonably high: "However, because the 21.4 cent [ex-tax] price as we have heretofore observed, is higher than Tennessee Gas is paying under any other contract, it should be subject to prompt investigation under Section 5(a) as to its reasonableness" (R. 926).

From this entire performance, only Commissioner Connole dissented (R. 930-34). The following excerpt from his opinion goes to the crux of the matter:

"Nothing but threats by the producers supports the proposition that this gas would be barred forever from the interstate market. And the very quantity of offshore gas affected by this decision makes it clear that the only practical market for gas of this kind for years to come is to the large consuming areas served by the long haul interstate pipelines. In my judgment the pricing pattern should not be set for so crucial a supply source in an atmosphere charged with urgency and in response to arguments whose primary motivation is private, not public, gain. The election by the producers to reject their public responsibility and insist on exercising the full strength of their bargaining position has altered completely the impact of logical and equitable arguments.

> The decision of the majority is justifiable only by the evil consequences of the loss of these reserves to the particular pipeline which is a party to the contracts. Such evils would, in the opinion of the majority, exceed the gain to follow from *the proof that the public convenience and necessity does not require the sale of this gas at proposed rates.*" (R. 932-3, emphasis added.)

Denial of Further Rehearing.

On July 23, 1957, the New York Commission applied for rehearing of the Commission's June 24 order (R. 1002-13). It was denied by order issued August 15, 1957 (R. 1025-6). Thereafter, the New York Commission sought review in the Court below (R. 475-542). On June 30, 1958, that Court reversed the Commission's order and remanded the matter for further proceedings consistent with its opinion (R. 653-662).

* * * * * * *

Before proceeding with the summary of our argument, we believe it important—and trust it will be found helpful to the Court—to place this important determination of the Commission in its proper context. Appreciation of its evolution and of its succession is vital to full comprehension of its ramifications and impact. It is but one step—a headlong one—in a decisional evolution which, we believe, evidences virtual abnegation by the Commission of its responsibilities to regulate the natural gas industry's interstate sales for the protection of the ultimate consumer of that product. That evolution follows:

FPC Regulation of Producer Rates in Southern Louisiana—the CATCO Prologue and Epilogue.

1. Natural Gas Act, Section 7.

Section 7 in pertinent part, provides:

> "(c) No natural-gas company or person which will be a natural-gas company . . . shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, . . . unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations. . . ."
>
> "(e) . . . a certificate shall be issued to any qualified applicant therefor, authorizing the . . . sale, . . . covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of this chapter and the requirements, rules, and regulations of the Commission thereunder, and that the proposed . . . sale, . . . to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

The section was enacted in its present form upon recommendation of the Commission in 1942 (56 Stat. 83, 84). The original 1938 enactment had provided for FPC certification of a natural gas company's expansion into an area already served by another and admonished the Commission in exercising that prerogative to

> "... give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention of Congress that natural gas shall be sold in interstate commerce, for resale for ultimate public consumption for domestic, commercial, industrial or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest" (Natural Gas Act of 1938, §7(c); 52 Stat. 825).

Thereunder, price was the principal feature of a certificate case. That it was to remain the essential ingredient—the determinative factor—in any and all certificate applications under the revised Section 7 is made abundantly clear by the legislative history of the present section. *Hearings before the House Committee on Interstate and Foreign Commerce on H. R. 5429,* 77th Cong., 1st Sess.; *House Report No. 1290,* 77th Cong., 1st Sess. (1941):

> "... By the unregulated construction of a pipe line, uneconomic construction, or inflated costs may make proper regulation of operation thereafter difficult or practically impossible. *The bill when enacted will have the effect of giving the Commission an opportunity to scrutinize the financial set-up,* the adequacy of the gas reserves, the feasibility and adequacy of the proposed service, *and the characteristics of the rate structure in connection with the proposed construction or extension at a time when such vital matters can readily be modified as the public interest may demand.* Without such authority the Commission may find itself confronted with a situation where it must either accept conditions which appear undesirable in the public interest, or require, subsequent to construction, changes which may have much more serious practical consequences than they would have had if they had been made before the public was

asked to finance the enterprise" (pp. 2-3; emphasis supplied).

See also, *Sen. Rep, No. 948,* 77th Cong., 2d Sess. (1942) at pp. 1-2.

> "These provisions [Sections 4, 5 and 7] were plainly designed to protect the consumer interests against exploitation at the hands of private natural gas companies." *F. P. C.* v. *Hope Natural Gas Co.,* 320 U. S. 591, 612 (1944).

2. The Commission's construction and application of Section 7—pre-Phillips.*

Consistently and meticulously (with two exceptions to be noted, *infra,* par. 3) did the Commission pursue the matter of price in each and every certificate application it considered, prior to the advent upon the regulatory scene of the independent producer-natural gas company. If the proof submitted in the certificate proceeding did not demonstrate the essential reasonableness of the price element—thus warranting unconditional certification—rate or price conditions were imposed having that design or, in the alternative, the application was denied. See, *e. g., Kansas Pipe Line & Gas Co.,* 2 F. P. C. 29 (1939); *Tennessee Gas Transmission Co.,* 4 F. P. C. 293, 300-306 (1945); *Michigan-Wisconsin Pipe Line Company,* 6 F. P. C. 1, 19-20 (1947); *aff'd sub nom. Panhandle Eastern Pipe Line Co.* v. *F. P. C.,* 169 F. 2d 881 (D. C. Cir., 1948), *cert. denied,* 335 U. S. 854 (1948); *Commonwealth Natural Gas Corp.,* 9 F. P. C. 70, 78 (1950); *Tennessee Gas Transmission Co.,* 9 F. P. C. 271, 276 (1950); *United Gas Pipe Line Co.,* 10 F. P. C. 35, 45-46 (1951); *Alabama-Tennessee Natural Gas Co.,* 9 F. P. C. 461 and 849 (1950); 11 F. P. C. 75, 91, 114 (1952), *aff'd* 203 F. 2d 494 (3rd Cir., 1953).

* *Phillips Petroleum Co.* v. *Wisconsin,* 347 U. S. 672 (1954).

Before the 3rd Circuit in the latter proceeding the FPC averred:

> "... the rates which an applicant for a certificate will charge are an essential ingredient of the finding which the Commission must make in granting a certificate in two ways under Section 7(e), namely—
>
> (1) 'that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder'
>
> and
>
> (2) 'that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity' (Section 7(e))" (F. P. C. Brief, p. 14).

Similarly, the Commission's representations to the Congress made manifest its long-standing conception that the price ingredient of the certificate application was vital and that nothing took precedence thereover. See 1949 Annual Report, p. 114; 1950 *id.* pp. 115-116; 1951 *id.* p. 109; 1952 *id.* p. 110; 1953 *id.* p. 112; 1954 *id.* p. 127.

3. The Gulf Interstate and American Louisiana certifications—1953-54.

In two instances—pre-*Phillips*—the Commission was prevailed upon to digress from its basic price policy respecting certifications. Prior to 1953 the overwhelming majority of producer (unregulated) sales to pipeline companies (regulated) in southern Louisiana (the onshore area) were at prices at or below 10¢ per Mcf. Tennessee Gas

Transmission Co.—a principal New York supplier—paid uniformly 9.32¢; Transcontinental Gas Pipe Line Corp.—another principal New York supplier*—paid between 6.85¢ and 10¢ per Mcf.** In 1953 and early 1954, two "paper" pipelines (not in being) seeking FPC authorization for construction of new transmission systems, entered the market to acquire the large reserves of natural gas typically required by the Commission as a prerequisite for new pipeline certifications. They had executed purchase contracts to take gas from specified fields in southern Louisiana at prices ranging from 17¢ to 21¢ per Mcf.

The FPC granted the certifications—without price limitation or conditions—but not without dissent or observation of the potentials. In the latter respect, the Commission was prescient.

(1) In *Matter of Gulf Interstate Gas Company*, Docket No. G-2058, Opinion 251, 12 F. P. C. 116, on May 20, 1953 the Commission observed:

> ". . . These prices, particularly the initial price of 20 cents per M. c. f. [without tax] to be paid for gas from the Erath Field, represent the highest costs for purchased gas in the southwestern gas producing area of the United States that have been submitted to us for consideration in connection with any proposed pipeline project . . ." (12 F. P. C. 116, 123)

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* The third large New York-serving pipeline—Texas Eastern Transmission Company—did not begin purchases in this area until 1957. See *infra*, p. 42, ftn.*

** *Analysis of Initial Prices in Contracts for Interstate Gas Sales from Fields in Southern Louisiana* (Chapin), Exhibit 54, in *Matter of Champlin Oil & Refining Co.*, Docket No. G-9277—introduced March 18, 1959 at R. 4159; R. 4162-74. Prices herein designated include Louisiana taxes unless otherwise indicated.

In 1953 Tennessee purchased 55,637,575 Mcf in the Gulf Coast area of Louisiana or 5.4% of the total sales. Transcontinental purchased 48,474,864 Mcf, or 4.7% of the total. In 1957 Tennessee purchased 138,577,055 Mcf, or 8% of the total and Transcontinental 105,074,806 Mcf, or 6.1%. *Gas Distributors Information Service, Field Price Study of Natural Gas* (1958) Sched. 1.

"We do not regard the probable increase in cost to the consuming public as the only disadvantage inherent in the price levels which United Fuel Gas proposes to pay for the gas it will purchase. We must recognize the fact that the payment of higher prices for purchased gas in the circumstances here presented may serve to increase the prices which must be paid for gas by other pipeline companies which were dependent for their gas supplies under existing contracts for the purchase of gas in the same general area where United Fuel Gas will buy the gas which Gulf Interstate will transport for it.

"The question is a serious one and the record in this case does not show to what extent the unusually higher price to be paid by United Fuel Gas for natural gas in the field will or may affect the cost of gas to other pipeline companies" (12 F. P. C. 116, 125).

(2) In *Matter of American Louisiana Pipe Line Company*, Docket No. G-2306, Opinion 276, 6 PUR 3d 476 (a similar case) on October 1, 1954 the dissenting Commissioners (Chairman Kuykendall and Commissioner Digby) observed:

"We recognize that a [pipeline] certificate case is not a 'producer or a pipeline] rate case. Nevertheless, we are concerned about the producers' prices as shown in their contracts, which are among the highest, if not the highest, known to this Commission . . .".

"We do not pass on the reasonableness of the producers' rates, but we do say this problem, in this first, precedent setting, certificate case since the Phillips decision, deserves consideration which is not being given here, and cannot be given under the present state of the record." 6 PUR 3d 489.*

* Although the *American Louisiana* proceeding was actually decided post-*Phillips*, the record had been compiled pre-*Phillips* and the Commission treated of it as such (*i.e.*, no FPC jurisdiction over producers).

With these two certifications, the producer price holocaust began—as will be demonstrated (*infra*, paras. 5 and 6).

4. June 7, 1954—Phillips.

In one fell-swoop, on June 7, 1954, this Court plugged the *legal* gap through which the very first (and most important) element of cost in the interstate acquisition, transmission and distribution of natural gas had theretofore been escaping effective regulatory control. The independent producer supplying the product was for the first time subjected to the jurisdiction of the FPC under the Natural Gas Act. From that date forward, the power to condition *pipeline* certifications upon *pipeline* rate adjustments ceased to be the only avenue of FPC control over the rates paid for gas. From that date forward, the producer-exacter of the initial price would himself require certification as a condition precedent to the disposition of his product for interstate sale. From that date forward, the producer would be subject to Section 4 of the Act (any *changes* in existing rates to be filed with FPC and be subject to suspension and refund) and Section 5 of the Act (all charges subject to FPC adjustment downward—*in futuro*—upon findings of excessiveness). And in this connection, this Court said:

> "Regulation of the sales in interstate commerce for resale made by a so-called independent natural-gas producer is not essentially different from regulation of such sales when made by an affiliate of an interstate pipeline company. In both cases, the rates charged may have a direct and substantial effect on the price paid by the ultimate consumers. Protection of consumers against exploitation at the hands of natural-gas companies was the primary aim of the Natural Gas Act" (*Phillips Petroleum Co.* v. *State of Wisconsin*, 347 U. S. 672, 685 (1954)).

5. Post-1954 independent producer rate regulation under Sections 4 and 5.

A. The first important post-*Phillips* series of rate increase (Section 4) applications by independent producers which were processed through the hearing and determination stages, involved filings by Union Oil, Sun Oil, Bel Oil, Forest Oil, and others. Each sought to effect an increase from 9.79¢ per Mcf. to 17¢ for deliveries to Transcontinental from southern Louisiana fields. These increases in producer rates were to become effective November 1, 1954. However, they were suspended by FPC upon a finding that they might be unjust and unreasonable and hearings upon the lawfulness thereof were scheduled. Upon expiration of the suspension periods (maximum of five months) the increased rates went into effect under bond. The hearings commenced on November 1, 1955 and continued into 1956. The producers—in concert—refused to justify the increases by any demonstration of need therefor (*i.e.*, cost of service evidence) and chose to rest exclusively upon their demonstration (a) that their contracts with Transcontinental called for 17¢ for gas supplied after November 1, 1954, and (b) that the "field price" for gas (*i.e.*, unregulated prices in the area) equaled or exceeded the 17¢ level, viz. *American Louisiana, Gulf Interstate*, etc. On December 6, 1956, the Commission found *that* demonstration to be inadequate, disallowed the increases, and ordered the producers to refund to Transcontinental the amounts received to date in excess of the pre-existing rates (9.79¢). *Matter of Union Oil Company of California, et al.*, Docket Nos. 4331 *et al.*, Opinion 300, 16 F. P. C. 100. See also *Matter of Sun Oil Company, et al.*, Docket Nos. G-8288 *et al.* (order issued February 6, 1957), 17 F. P. C. 174; *Matter of Forest Oil Corporation*, Docket No. G-5510 (order issued April 26, 1957), 17 F. P. C. 586.

Petitions for review of these determinations were granted in part and denied in part by the Court of Appeals for the 5th Circuit, *sub nom. Bel Oil Corp.* v. *F. P. C.*, 255 F. 2d 548 (1958), *cert. denied* 358 U. S. 804; *Forest Oil Corp.* v. *F. P. C.*, ... F. 2d ..... (CA 5th, Feb. 20, 1959). The propriety of FPC's evaluation of the inadequacy of the proof submitted to justify the price was confirmed by the Court, largely in reliance upon *City of Detroit* v. *F. P. C.*, 230 F. 2d 810 (CADC, 1955), *cert. denied*, 352 U. S. 829 (1956)—viz., field price data alone does not suffice. But, by reason of the Commission's neglect to formulate the standards which it will apply in evaluating the justness and reasonableness of producer rates—and to apprise the petitioners thereof—the Court remanded the cases to the Commission for further proceedings. The refund order was annulled. The increased rates remain under bond.

In point of fact, the Commission has not yet formulated those standards and, at this writing, no one knows how it will proceed in these cases or in this field.*

B. Although, since 1954 several Section 5 proceedings have been instituted by the Commission, to evaluate the propriety and lawfulness of independent producer rates, *not a single one has been considered by the Commission* (including the original *Phillips* proceeding (Docket No. G-1148) which grew out of this Court's decision of June 7, 1954!).** As of this writing, no one knows how the Com-

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* But *cf. Matter of Pan American Petroleum Corp.*, Docket No. G-8549, Opinion 310, April 4, 1958, 19 F. P. C. 463, wherein, largely in reliance upon field price data (comparable sales), the FPC determined 8.5¢ per Mcf. to be "just and reasonable" under Section 4; *Matter of William Negley*, 17 F. P. C. 550, 562 (1957)—12.25¢ determined to be "just and reasonable" in a Texas field. *The latter price is the highest yet so determined.*

** Examiner's Intermediate Decision rendered April 6, 1959 finding a unit cost of service of 11.662¢ per Mcf.

mission will proceed with respect to the independent producer under Section 5.*

In other words, the effectiveness of both Section 4 and Section 5 as devices for the protection of the ultimate consumer of natural gas, against price incursions of the independent producer, has yet to be demonstrated. In the meantime, those incursions proceed unabated as will be demonstrated (*infra*, paras. 6, 7 and 8).

6. Post-1954 independent producer price regulation under Section 7 (pre-CATCO).

A. *Purchases by Transcontinental.* The Commission's forebodings of the impact of its 1953-54 *American Louisiana* and *Gulf Interstate* pipeline certifications, condoning 17-21¢ producer prices (*supra*, para. 3), shortly proved to be more

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* The course of the Section 5 proceedings to which the Commission relegated the instant CATCO sales is illustrative (CATCO gas started to flow in June, 1958):

(1) Atlantic Refining Co.—Section 5 proceeding instituted Jan. 27, 1956 in Docket No. G-9283. Not yet noticed for hearing.

(2) Tidewater Oil Co.—Section 5 proceeding instituted Jan. 27, 1956 in Docket No. G-9283: by order of Sept. 27, 1958 assigned Docket No. G-13310. Staff presentations made in October 1957. Cost of service study reflected 6.63¢ per Mcf. to 7.95¢ per Mcf. CATCO sale *omitted*—Tidewater counsel stating he knew of "no way of handling the [CATCO] matter". Hearing to reconvene April 14, 1959 for presentation of Tidewater case (defense).

(3) Cities Service Production Co.—Section 5 proceeding instituted concurrently with CATCO order of June 24, 1957 in Docket No. G-12780. Company presented its case in November 1958, using as test year 1957 (thus excluding CATCO sales). Hearing to reconvene September 4, 1959.

(4) Continental Oil Co.—Section 5 proceeding instituted Jan. 27, 1956 in Docket No. G-9279. In November 1958 Staff presented its case using 1955 test year (thus also excluding CATCO sales). Proof reflects 8-9¢ per Mcf. cost of service and equivalent 1955 revenues. Company moved to dismiss for lack of proof of unjustness of rates. In its consideration of that motion, the Commission intimated that *intervenors* should bear a portion of the burden of proof of unreasonableness—decision deferred to permit thereof. The gambit was declined. The motion was renewed. It is now pending.

than warranted and in more ways than even the Commission anticipated. First and foremost, for *new* gas supplies all pipeline purchasers in southern Louisiana were confronted with demands for 17-21¢. No producer was going to be outdone by his *American Louisiana* and *Gulf Interstate* confrères if he could help it. Thus, the previously prevailing 10¢ price level evaporated and was supplanted by the new 17-21¢ price level. In the second place, and perhaps more importantly dollarwise, the *American Louisiana-Gulf Interstate* and concomitant sales triggered a large number of "favored nations", price redetermination and other types of price escalation clauses in outstanding contracts covering gas supplies *previously* dedicated to the interstate market at lower prices. For instance, Transcontinental's outstanding contracts with Union Oil, Sun Oil and others (independent producers) providing for 9.79¢ per Mcf. were immediately renegotiated to provide for a 17¢ per Mcf. price. The process was described by the Commission as follows:

> "During this period (1952-54) Union Oil and Louisiana Land Company (and others) conducted negotiations with Transcontinental looking toward an upward revision of the price. These negotiations were apparently motivated by operation of favored-nation clauses in the basic contract. The record shows that Transcontinental was faced with the fact that several other purchasers were offering to pay considerably more than the 9.79¢ interim rate. *Rates as high as 20¢ per Mcf were being offered in the area under favored-nation clauses. The applicants might demand that Transcontinental pay the 20¢ rate.* Nonetheless Transcontinental, because it felt it could not afford the 20¢ rate, resisted full increase, explored the possibility of acquiring supplies elsewhere and finally bargained for the 17¢ rate here involved." *Union Oil Company of California, et al.*, Docket No.

G-4331, et al., Opinion No. 300, 16 F. P. C. 100, 106 December 6, 1956. (Emphasis supplied.)

These negotiated increases gave rise to the first major, post-*Phillips*, inconclusive Section 4 producer rate increase proceedings (*supra*, para. 5). Simultaneously, Transcontinental entered into new-gas purchase contracts with other producers calling for initial prices at levels never thereafter below the 17¢ price. Producer applications to FPC for certification of these new sales provided the landmark FPC opinions, post-*Phillips*, under Section 7.

It being perfectly obvious that these 17¢ prices were solely attributable to Transcontinental's renegotiations which had been triggered by *American Louisiana* and *Gulf Interstate*, and that they had no other justification than that (except the producers' desire not to be paid less), the New York Commission and other representatives of the consumer (who bears the brunt of *all* costs, of course) objected to unconditional certification of these new purchases at that price level. We were willing to assume the propriety of the pre-existing 9.79¢ price level (though even that had never been determined to be "just and reasonable"), and condone issuance of producer certificates at that level. We were not willing to do so at the totally unjustified 17¢ level, the propriety of which the Commission was *then* investigating in Section 4 proceedings (*supra*, para. 5). These objections the Commission in its first major post-*Phillips* producer certifications, cast aside.

In Matter of Anthony J. Tamborello, et al., Docket No. G-3045 *et al.*, Opinions Nos. 287, 11 PUR 3d 413 (1955), and No. 287-A, 15 F. P. C. 1 (1956), 12 PUR 3d 219, on November 28, 1955, the Commission granted unconditional producer certifications for Transcontinental's new-gas purchase (17¢) contracts. Opinion No. 287 pointed out:

1. That the Commission was by no means precluded in a Section 7 producer proceeding from inquiry into the propriety of the proposed prices;

2. That the imposition of a rate reduction condition in such a proceeding was sanctioned by administrative precedent and judicial approval, and was in accord with the policy of the Natural Gas Act as indicated by its legislative history; and

3. That the Commission had uniformly given favorable consideration to, and had actually employed the practice of imposing initial rate conditions where necessary to protect the public interest, all as evidenced by various decisions and by statements in its annual reports;

but concluded that, inasmuch as

(1) the interests of the consuming public against the exaction of excessive producer rates could be "adequately" protected by the institution of rate investigation proceedings under Section 5 of the Act;

(2) the estimated dollar increase in Transco's cost of service, resulting from the purchase being certified, *per se*, was negligible; and

(3) the resolution of rate issues would be a time-consuming process,

certificates should issue at the proposed contract prices.

The New York Commission accepted (ill-advisedly, it subsequently developed) and relied upon FPC's assurance that its Section 4 and Section 5 pursuits of producer price incursions would in fact prove "adequate".

Thus did the 17¢ price for Transcontinental purchases (and all others) become the fixed floor in southern Louisi-

ana. See *Matter of Sinclair Oil and Gas Co., et al.*, Docket No. G-9049 *et al.*, 15 F. P. C. 665 (1956).

Depiction of the *Tamborello* determination would not be complete, however, without reference to *Matter of Cities Service Gas Co., et al.*, Docket Nos. G-2569 *et al.*, Opinion No. 288, 14 F. P. C. .....; 12 PUR 3d 3. In an opinion issued on the same day as was *Tamborello* (November 28, 1955), the Commission reviewed a request for its certification of a sale of gas by Signal Oil and Gas Co. to Cities Service Gas Co. in a field in southern Oklahoma, at an initial price of 12¢ per Mcf. It had been demonstrated that such a certification would disrupt the prevailing 10¢ price in the Oklahoma field, to the detriment of other purchasers therein (both interstate and intrastate—principally Oklahoma Natural Gas Co.). The applicant had offered no justification for the 12¢ price other than the fact that it had contracted therefor in arms'-length bargaining. The Commission certificated the sales, but only upon the condition that the initial price be revised downward to the 10¢ level. Said the Commission:

> "The evidence is both clear and uncontradicted with respect to the effect of granting Signal a certificate covering its proposed sale to Cities Service without imposition of the rate condition in question. The general area price for natural gas in the south-central region of Oklahoma would become 12 rather than 10 cents per Mcf, unless we later refused to permit rate-increase applications by other sellers in the area filed as a result of a 12-cent rate for the sale by Signal. Even such later action could be effective only with respect to interstate sales and, further, it would be difficult to justify such later refusal if we declined to act now with reference to the similar sale presented in this proceeding.

"Signal contends that the rate at which it proposes to sell natural gas to Cities Service is reasonable because it is the result of an arm's-length transaction negotiated under free competitive economic conditions. No defense of the proposed rate is made other than that contention. Under the less extensive jurisdiction believed to exist before the decision in the Phillips case, *supra*, p. 25, we exercised the authority to disallow rates which were not the result of arm's-length bargaining. The argument, made after that decision, that we must or may limit our inquiry with respect to the rates of an independent producer to the question of arm's length, is untenable. *The determination that a sale by an independent producer is at arm's length is not sufficient as the sole criterion in the determination of reasonableness of rates.*

"In this, a proceeding upon a certificate application, Signal as applicant-seller has the burden of proving all elements of its application so that we may conclude that the service proposed is or will be required by the present or future public convenience and necessity. *A vital element of such proof is concerned with the rates proposed*" (12 PUR 3d 3, 13-14).

* * * * * *

"It has been stated, rather than order a rate condition in this proceeding, that we may immediately order commencement of a rate-investigation proceeding under Section 5 (a) of the Natural Gas Act into Signal's rates and charges. This, of course, is true. However, *recourse to a proceeding under Section 5(a) in a situation of this nature has several critical disadvantages, all detrimental to the public interest.*

"Fundamental to the concept of rate regulation of the natural monopoly is the principle that the

burden of demonstrating the reasonableness of the rates and charges assessed on and to be collected from rate payers should vest primarily in the proponent of the rate. Many organic statutes of regulatory commissions hold that this burden never shifts, regardless whether the assailed rates are effective or not. Under the Natural Gas Act, however, once a schedule of rates and charges has been filed and becomes effective, the burden of going forward with the evidence at least is borne by the complainant alleging an unjust preference, prejudice or discrimination or by the Commission commencing an investigation on its own motion. It becomes clear, therefore, that in order effectively to attack a rate or a charge which has been filed and has become effective through operation of law, an unnecessarily difficult and complex procedure must be followed to the disadvantage of the public interest.

"A proceeding under Section 5(a), moreover, is certain to entail a long delay in terms of time of final decision, and there is no way of undoing the damage done to the public in the interim period. A proceeding under Section 5(a) is, itself, more time consuming than the course of action we employ here, thus, administratively more difficult and would confront us with a multiplicity of actions, all brought on by our failure to act in the first instance" (12 PUR 3d 3, 15). (Emphasis supplied.)

Upon review, this never-thereafter-to-be-repeated exercise of FPC responsibility under Section 7 was sustained by the courts, *sub nom., Signal Oil & Gas Co.* v. *F. P. C.*, 238 F. 2d 771 (CA 3rd 1956), *cert. denied*, 353 U. S. 923 (1957), upon the ground that *applicant* had neither established the propriety of the 12¢ price nor the impropriety of the 10¢ condition. Though the application of the *Signal*

doctrine in southern Louisiana and other areas has repeatedly been sought, the FPC has never seen fit to repeat it.*

* The aftermath of *Signal* in the Oklahoma fields is ironic. Barely one year after its refusal to condone an unjustified producer price rise to 12¢ in that area, the FPC (reversing its presiding examiner who had recommended a *Signal*-type certification) issued unconditional certificates for sales at 13.9¢ per Mcf. and higher. *Matter of Natural Gas Pipeline Company of America*, Docket No. G-4280, Opinion 299, 16 F. P. C. 80, 16 PUR 3d 277, December 4, 1956. Oklahoma Natural Gas Company, the successful intervenor in *Signal* (even more aggrieved here) petitioned for review, contending that Section 4 proscribes unjust and unreasonable rates and the instant 13.9 cent-plus price had not been demonstrated to be "just and reasonable". The DC Circuit affirmed (2 to 1), stating *inter alia* that "The Commission cannot be required to convert every certificate proceeding into a rate proceeding." *Oklahoma Nat. Gas Co.* v. *F. P. C.*, 257 F. 2d 634 (1958). This Court granted certiorari (Oct. Term, 1958, No. 288, November 10, 1958). Petitioner's brief was filed and the case was scheduled for argument when abruptly, on February 20, 1959, *petitioner* filed a motion to dismiss! The motion speaks volumes:

> "Competitive conditions for the purchase of gas in southern Oklahoma have increased the price of gas to the extent that in order to continue to purchase gas, Petitioner has found it necessary to contract to pay a price for substantial reserves of gas in that area which is in excess of the price being paid under the contracts in issue in the cause here under review. As Petitioner has pointed out throughout these proceedings, it must purchase gas continuously in order to be able to continue to serve its customers and when faced with the decision of continuing to contest the price being paid to the producer-applicant Respondents herein or purchasing substantial reserves of gas, it determined in this instance that, as a matter of its best business judgment, it must meet the higher price and purchase such reserves. The loss of these large reserves of gas to other competitive purchasers offering higher prices would seriously affect Petitioner's ability to serve its customers in years to come. Petitioner has now agreed to pay a price for gas in southern Oklahoma which exceeds the price being paid to the producer-applicant Respondents herein [16.8¢ per Mcf.]. Therefore, Petitioner states that the relief sought herein, in all of the circumstances existing in this case, would serve no useful purpose. In view of the foregoing and inasmuch as the Petition for Writ of Certiorari was predicated upon there being a substantial question as to the reasonableness of the rates proposed to be paid for natural gas, arising principally from the fact that the rates proposed were substantially in excess of the prevailing rate in the area which resulted in serious detriment to the Petitioner, and this is no longer true, this cause is now moot."

In sequence, the DC Circuit, upon its own motion, on March 18, 1959 ordered the parties in this proceeding to show cause why Oklahoma's 1958 cause before it should not be deemed equally "moot". (That cause is better described as "suppressed" by reason of capitulation to cold, unrestrained (by FPC) economics and at a cost of millions of dollars to the hapless consumer (see Oklahoma's Sup. Ct. brief, pp. 6-7, ftn. 5).

B. *Purchases by Tennessee.* With Transcontinental leading the 1954-56 southern Louisiana purchase price parade from 10¢ to 17¢, Tennessee Gas Transmission Company, the other major New York-serving pipeline in the area followed along. Indeed, it had no choice. The climb from its pre-1954 uniform level of 9.32¢ per Mcf to its pre-CATCO (1956) high of 18¢ per Mcf occurred slightly more gradually, though with similarly undeviating line of assent. See e.g. *Matter of Alabama-Tennessee Natural Gas Company, et al.*, Docket G-2534, (1955).

From a "me too" follower, however, Tennessee suddenly became the chief perpetrator of the next (the instant) precipitous boost of the price level of natural gas in southern Louisiana—this time from 18¢ to 22.4¢.

7. CATCO—June 24, 1957.

Such is the background of the instant determination. Its epilogue—which is even more important—follows.

8. Post-1957 independent producer price regulation under Section 7.

The 22.4¢ initial price level *CATCO* established and condoned shortly washed right up on-shore and became the fixed floor for subsequent pipeline-producer negotiations for gas, off-shore and on-shore, in southern Louisiana. *Matter of Transcontinental Gas Pipe Line Corp.*, Docket No. G-13143, Opinion 315, 20 F. P. C. 264, Sept. 4, 1958, *infra*, par. 8, case (7).

During the pendency of *CATCO* on review and prior to the Third Circuit's June 30, 1958 pronouncement thereupon, the FPC devoted an inordinate amount of attention and consideration to a series of relatively unimportant, uncontested producer certification cases which, while they too broke through the pre-CATCO prevailing price level,

did not (with two exceptions) surpass the CATCO 22.4¢ pinnacle. Therein, cumulatively, the Commission evolved new "standards" for the evaluation of new-high-price certificate applications and new procedural (burden of proof) rules of the game. Both had the effect of simplifying the task of the new-high applicant; and of avoiding the occasion for repetition of the CATCO capitulation-to-threat spectacle. Both had the effect of making the price-conscious intervenor's task virtually impossible; and setting the stage for and expediting the next and succeeding important piercings of the initial price ceiling. Both had the effect of enabling the same Commission—which had twice found it impossible (in the absence of threats) to certify a 22.4¢ price (without demonstrated concomitant triggering consequence)—to certify without qualms, upon identical proof, one year later, a 23.3¢ price with an immediate $5 million triggering effect and an immediate multi-million dollar increase for the pipeline-purchaser's customers. The sequence of cases follows:

(1) *Matter of Hope Nat. Gas Co.*, Docket No. G-12571, 19 F. P. C. 405, March 31, 1958—certification of West Virginia sales at 7¢ higher than the prevailing level, without full hearing, in the face of FPC Staff insistence of lack of demonstration of public convenience and necessity therefor. There was no other opposition.

"We are of the view that if the applicant proves there is a market for the gas at the proposed price and that the project is economically feasible at the proposed price (both market and economic feasibility being factors which we consider in determining public convenience and necessity) that it has sustained its burden of going forward with the evidence, and in the absence of evidence showing that the proposed price or rate adversely affect the public convenience

and necessity, the applicant has made out a prima facie case, and a certificate should issue to it" 19 F. P. C. 405, 407.

With that, there is no longer any need for CATCO-like threats, of course.

Commissioner Connole dissented, 19 F. P. C. 405, 410.

(2) *Matter of Seaboard Oil Co.*, Docket No. G-11970, Opinion 309, 19 F. P. C. 416, March 31, 1958—Louisiana producers obtain certification of 19.5¢ sales in the face of FPC Staff demand for an 18¢ condition. The Commission (a) found no evidence to support the requested condition and placed the burden of proof to support the reasonableness of such a condition upon the *proponent* thereof; (b) "distinguished" *Signal;* (c) found no price disruption to ensue from the 19.5¢ initial rate (citing *Gulf Interstate* and progeny, *i.e.*, the damage was already done); (d) found no deleterious effects upon the pipeline-purchaser's customers; (e) relegated all producer rate matters to Section 5 proceedings, to save time and administrative effort; (f) castigated its Staff for bothering with comparable field price studies (reflecting a great predominance of sales at lower prices) which were found useless;* and (g) found it impossible to select a lower price level for conditioning purposes—all the while giving lip service to its powers and duty to do so under circumstances which "may exist".

Specifically, the Commission held forth the prospect of initial price conditioned certification if the proposed price (1) would increase costs of customers of the pipeline purchaser, (2) compel other pipelines to pay more for gas in the area, or (3) set a new high price plateau (19 F. P. C. 419, 424).

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* *Cf.* FPC reliance thereupon in fixing "just and reasonable" rates under Section 4. *City of Detroit* v. *F. P. C.*, 230 F. 2d 810 (CADC, 1955), *cert. denied* 352 U. S. 829; *Matter of Pan American Petroleum Corp.*, Opinion 310, 19 F. P. C. 463 (1958).

Commissioner Connole dissented, vigorously. 19 F. P. C. 427. No participant in the proceeding was in a position to initiate review proceedings.

(3) *Matter of Southern Nat. Gas Co.*, Docket No. G-13082, 19 F. P. C. 558, April 18, 1958—Louisiana producers obtain certification of *22.8¢* sales, after an abridged hearing, in the absence of opposition. The Commission observed in passing:

> "These proposed prices will be among the highest to be paid for natural gas in the southern Louisiana area." 19 F. P. C. 558, 559.

Commissioner Connole dissented. 19 F. P. C. 561.

(4) *Matter of Sunray Mid-Continent Oil Co.*, Docket No. G-12211, 19 F. P. C. 618, May 9, 1958—Louisiana producers obtain certification of sales at 21.5¢, notwithstanding FPC Staff request for an 18¢ condition, citing *Seaboard*, Opinion 309. There was no other opposition. Commissioner Connole dissented 19 F. P. C. 620.

(5) *Matter of Superior Oil Co.*, Docket No. G-12121, 19 F. P. C. 637, May 9, 1958—Louisiana producers obtain certification of sales at 21.3¢ notwithstanding staff objections. Again, no one could petition for review. Again Commissioner Connole dissented, in part as follows (19 F. P. C. 639-40):

> "To me it seems so obvious as to defy argument that the prime cause for the abrupt and continuing increase in the price at which gas is being brought under contract in south Louisiana (and to a somewhat lesser extent elsewhere) is the lack of a meaningful administrative regulation of the prices themselves. In the absence of a willingness or ability on the part of the industry to demonstrate where the range of reasonableness is, and lacking the deterrent of a refusal by us to accept high prices in initial contracts, buyers of gas have little choice if the gas that is becoming available is to be obtained.

This proceeding is but another turn of the wheel. Once again a buyer has to meet the highest price being paid by any other pipeline if it hopes to do business with the producers involved. And once again an opportunity to brake the headlong rush is lost.

This proceeding also illustrates the rapidity and the extent of the increases in prices for new gas purchases in the south Louisiana area. In the six months during which this contract was under negotiation the highest price being paid in the area was bid from 17¢ up to 21.3¢ or an increase of *twenty-five per cent in six months!* And this is in an area where some 373 million Mcf were purchased by interstate pipelines in 1956!

This record shows only 8 contracts out of 88 in the area at a price of 21¢, including taxes, Exhibit No. 4 discloses that 85 per cent of the contracts are at levels of 18¢ and less. Reference to the annual reports, Form 2, filed by pipelines with this Commission and part of our public records discloses that for the last calendar year for which data is available (1956) over 82 per cent of the 373 million Mcf of natural gas bought in the area by those lines was bought at prices of 17¢ per Mcf or less.

I say again what I said in *Re Seaboard Oil Company*, et al., G-11970, et al., Opinion No. 309, 19 F. P. C. 416: 'During this difficult period some workable, practical deterrent must be placed on the rate of increase to avoid permitting prices to rise by sheer momentum to unknown altitudes where they may or may not be able to survive the test of reasonableness when it is devised.' This record, like *Seaboard*, presents an opportunity to deter that increase. And, like *Seaboard*, it contains nothing to support the assertion that the public convenience and necessity requires this sale at 21.3¢, except self-serving contentions and the admission of helplessness that I quote at the beginning.

This record contains ample evidence showing the price at which a typical new sale in the area could reasonably be expected to occur. It contains nothing of substance to demonstrate why this sale is different. Accordingly, it will not support an assertion that the public convenience and necessity requires the authorization of this sale at the proposed price. To so much of this order that holds otherwise, therefore, I dissent."

(6) *Matter of United Gas Pipe Line Co.*, Docket No. G-12712, 19 F. P. C. 931, June 12, 1958—Louisiana producers obtain certification of sales at *22.5¢*. Staff's contention for conditions restricting initial price to 18¢ were discarded. There was no other opposition. Commissioner Connole dissented. 19 F. P. C. 932.

(7) *Matter of Transcontinental Gas Pipe Line Corp.*, Docket Nos. G-13143 et al., Opinion 315, 20 F. P. C. 264, September 4, 1958—twenty-five of Louisiana's major producers obtain unconditional certifications for the sale of gas to Transcontinental at 22.4 to *23.3¢* for Mcf. This was the first major certification case to follow the *CATCO* reversal by the Third Circuit—the implications of which the Commission noted but largely ignored.

The producers had proven their contracts, their ability to supply and Transco's willingness to buy. Such is all that is necessary, the Commission held, in the absence of proof (which *intervenors* must supply) of the unreasonableness of the price. This, in the face of the demonstrated facts that:

(1) The purchase would immediately trigger Transco's existing gas acquisition contracts at a cost of some $5 million annually.

(2) It would prompt increases for Transco's distributor customers of 2¢ immediately; undoubtedly more later.

(3) The 23.3¢ price established a new high in the area. (Although the contract price exceeded any

theretofore certificated, the Commission nevertheless found no field price disruption, ostensibly because others had already contracted for more.)*

The Commission expressed its distaste for and abhorrence of becoming a "kind of peace-time OPA" for the natural gas producing industry (20 F. P. C. 264, 273) and concluded:

> "Certainly in the present context such factors as the assurance of supply in meeting urgent and extensive demands on Transco's system can reasonably be found to outweigh such undesirable aspects of the prices proposed by the producers as may exist in this case, where as here, *the price is reasonably justified and there is no substantial showing of adverse effects from such prices on the public.*" (!) 20 F. P. C. 264, 283.

Commissioner Connole's dissent here is a classic. 20 F. P. C. 288-302.** In this proceeding, the consumer voice was heard and this determination is on review, *sub nom. United Gas Improvement Co. and Philadelphia Electric Co.* v. *F. P. C.*, (CA 3rd, No. 12,797); *Public Service Commission of New York* v. *F. P. C.*, (CA 3rd, No. 12,805).

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And the upward producer price spiral continues. *Matter of Sun Oil Co.*, G-15122, March 3, 1959—examiner recommends certification of Louisiana producer sales at 23.8¢ per Mcf. to United Gas Pipe Line Co. (holding costs of production to be irrelevant in a producer case); *Matter of*

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* Texas Eastern Transmission Co. had previously jumped into the southern Louisiana market with a 23.9¢ splash. FPC Docket No. G-12446, pending.

** See also *Threshold Prices: A Practical Proposal for Producer Pricing* (Connole) 63 Public Utilities Fortnightly 23, 26-27, Jan. 1, 1959.

Trunkline Gas Co., Docket No. G-15394 et al.—*24.05¢* in the offing.*

Statistical Summary.

The impact of the 120% increase (10¢-22¢) in the predominant Louisiana new gas purchase contracts 1954-57, is partially reflected in the following statistical depiction of the concomitant 56% increase in the *average* cost of gas delivered to interstate pipelines in that area.** The latter is directly and exclusively attributable to the former—time lag largely accounts for the discrepancy.

THE FIELD PRICE OF GAS, 1953-1957
(interstate only)

	Louisiana		
	MMcf	Dollars (000's)	¢/Mcf
1953	964,619	$ 87,610	9.1¢
1954	1,038,070	100,821	9.7
1955	1,248,011	139,628	11.2
1956	1,431,656	177,783	12.4
1957	1,631,150	231,164	14.2

9. The Commission's report to Congress—January 7, 1959.

The Commission's 1958 Annual Report seeks amendment of ". . . the pertinent sections of the Natural Gas

* Initial price considerations in a producer certificate case have fallen to such a low ebb, in the Commission's conception, that the New York PSC has been barred from participation in this proceeding. PSC's concern with the new high price certification proposed herein for Texas and Louisiana areas, and the impact thereof upon New York-serving pipelines already there, is no longer deemed sufficient even to qualify the New York consumers' representative as "an *interested* State commission" (Nat. Gas Act, §15(a); FPC Rules §§1.8 and 1.37(f) for purposes of *intervention* before FPC! See orders issued in this Docket November 14, 1958, January 30, 1959 and March 26, 1959. Amazingly, the examiner recommended *denial* of the application. Intermediate Decision issued April 1, 1959.

** Source: FPC Report, issued November 12, 1958

Act . . . to provide for (1) elimination of any requirement for certificates of public convenience and necessity for producers of natural gas" (p. 15). It also contains the following statement:

> "In issuing certificates for new pipelines and extensions of existing pipelines into new market areas, and for independent producers to provide interstate natural gas service, the Commission generally has followed the practice of giving consideration to the proposed rates. For certificate cases in which the proposed rates are subject to Commission jurisdiction, a review is made to determine whether rate proposals are consistent with the statutory requirements of reasonableness and nondiscrimination. As a result, the Commission in several instances has conditioned the certificates to assure that the services authorized will be rendered initially under reasonable rates" (p. 78).

* * * * * *

Such is the aftermath of the Commission's CATCO determination. Its demotion of the initial price issue in a producer certificate proceeding to a status of secondary import (in response to threat and cajolery), prefaced the subsequent relegation of that issue to oblivion. The demise of the issue occurred under a procedural onslaught conceived, devised and launched by the Commission (i.e., the unassailable, automatic-*prima-facie*-case thesis) while CATCO was pending on review in the Court below. Contemporaneous protestations by the Commission of lingering care and concern for the subject have since been demonstrated to lack any semblance of sincerity. ***Matter of Transcontinental Gas Pipe Line Corp.***, Docket Nos. G-13143 *et al.*, Opinion 315, 20 F. P. C. 264 (1958). Producer certificate regulation has emerged as a colossal farce.

Each and every post-CATCO, southern Louisiana certificated producer price in excess of the 17-18 cent level, has as its origin an FPC determination founded upon the same basic deficiency, the same error of law, the same abuse of authority as is at the root of the CATCO determination—i.e. the absolution of the producer applicant from any obligation to explain, rationalize or justify his price as a condition of the entry of his product into the interstate market. *That* is the vitally important aspect of the case before this Court. The other—the authenticity, propriety and import, in the context of a producer Section 7 proceeding, or threats to withhold gas from the interstate market—while important here, has since June 24, 1957 become one that is of little or no moment. Such tactics—such utterances—are no longer in vogue. They have since been rendered totally unnecessary and passé.*

Summary of Argument.

In its two earlier orders herein, the Commission expressly and correctly observed that the record was inadequate to support a conclusion that public convenience and necessity required, or even permitted, certification of these sales at the initial price proposed (R. 837, 906). That was within its province. Upon this record, that was its statutory obligation. On June 24, 1957, on the identical record, without an additional word of testimony or any additional evidence whatever, *and without altering those findings*, the Commission concluded to certificate the sales anyway—

* But cf. remarks by Transco counsel before the Commission on August 1, 1958 in *Matter of Transcontinental Gas Pipe Line Co.*, Docket Nos. G-13143 *et al.*, *supra:* "Counsel for the New York Commission has spoken rather eloquently of the dire consequences of the prices of gas involved in these contracts. I just wonder which is the most disastrous—these prices or no gas."

without limitation or condition. In so doing it based its action upon its *assumptions* (1) that the CATCO supply of gas was urgently required by the public to be served upon completion of Tennessee's expansion program (measuring that requirement without the aid of any evidence and without considering the element of cost) and (2) that unless certificates of public convenience and necessity were issued upon the CATCO terms, this supply of gas would be lost to Tennessee and withdrawn from the interstate market (measuring the likelihood of that happenstance solely upon representations relayed second hand by Tennessee and equivocal, though clear enough utterances of counsel upon oral argument).

The issuance of unqualified certificates of public convenience and necessity to these applicants for these sales, under the circumstances, was erroneous as a matter of law. The denomination by the Court below of that error as in excess of the Commission's "statutory jurisdiction" was clearly apt and correct. The Commission simply lacked statutory authority or discretion so to act.

ARGUMENT.

POINT I.

Consideration of the impact of initial price is the *sine qua non* of any determination of whether proposed sales of natural gas should be certificated for the interstate market. It is *the* "prime determinant."

The Natural Gas Act in its design to protect the consumer from unwarranted price exactions, however and whenever attempted (*F. P. C.* v. *Hope Natural Gas Co.*, 320 U. S. 591, 612 (1944); *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, 685 (1944); *City of Detroit* v. *F. P. C.*,

230 F. 2d 810, 815, 816, 818 (CA D. C., 1955) *cert. den.* 352 U. S. 829), and the record, briefs and decision of the court in *Signal Oil and Gas Co.* v. *F. P. C.*, 238 F. 2d 771 (CA 3rd, 1956) *cert. den.* 353 U. S. 923, make this virtually a self-evident proposition. As a practical matter, producer sale proposals seldom involve any other factor of materiality for consideration by the Commission under Section 7. The sale contracts having been executed, the gas supply having been confirmed, the producer has evidenced his readiness and ability to perform before he ever steps foot into the Commission's hearing rooms. The only issue left, in most instances, is the matter of price.

And (1) such sales having been expressly forbidden except upon express approval of the Commission; (2) the Commission having been directed by law to determine whether public convenience and necessity require any such proposed sale; (3) the Commission having been (a) expressly adjured by law to limit its certifications "to the extent authorized" thereby and (b) expressly authorized by Congress to impose price conditions upon its authorizations for such sales, both in furtherance of its basic obligation to the consumer; (4) the Commission being otherwise powerless to prevent payment of the initial price proposed or to effect any reduction thereof subsequently,* except after protracted proceedings under Section 5 of the Act in which no means is afforded of effecting repayment or reimbursement of sums ultimately found to be excessive; (5) the Commission and everyone else being acutely aware from vivid experience that its condonation, in a Section 7 proceeding, of the initial new-high price proposed in a *single* producer-pipeline pur-

* An initial price filing—not constituting a "change"—cannot be suspended or made the subject of inquiry *per se* under Section 4: FPC Rules, §2.4 (d). The Commission will not permit of "collateral attack" upon prices paid producers by a pipeline in a pipeline rate case. *Matter of Tennessee Gas Transmission Company*, Docket No. G-5259, order issued July 14, 1955.

chase contract, fixes irrevocably an immutable price floor for the production area, below which no future sales or acquisitions can or will be effected; (6) the Commission and everyone else being acutely aware that a *single* new-high certification will or may serve to trigger all sorts of "favored-nation", price redetermination and other price escalation clauses in existing gas purchase contracts and thus occasion *en masse* rate increases which the Commission may forestall by suspension only momentarily under Section 4; and, finally (7) the Commission and everyone else being acutely aware of the utter breakdown of its price-rate regulatory controls provided by Sections 4 and 5 (no "just and reasonable" rate for a major producer having yet been determined under either rate provision)—it would seem readily apparent that the Commission is under a continuing duty to scrutinize and evaluate most carefully the initial price proposed in each and every Section 7 producer application. Unless it is affirmatively established therein that the proposed sale *at such proposed initial price* is, in all respects, reasonably in the public interest, the Commission is required by law either (1) to deny the application *in toto* or (2) to limit or condition the certificate to be issued upon reduction of the initial price to a level which the Commission has reason to believe will be without deleterious effect upon the interstate market, the interstate pipelines and, through them, the ultimate intrastate consumers. To repeat, these, it seems to us, are obvious truisms.

Nothing contained in any judicial pronouncement, including *Oklahoma Natural Gas Co.* v. *F. P. C.*, 257 F. 2d 634 (CA DC, 1958); *cert. dismissed* Feb. 20, 1959 (see *supra*, p. 35, ftn.*) or *Florida Economic Advisory Council* v. *F. P. C.*, 251 F. 2d 643 (CA DC, 1957), *cert. denied* 356 U. S. 959 (1958) holds to the contrary.

Florida was a proceeding instituted by an association of purveyors of competitive fuels, who opposed the introduction of natural gas into the State of Florida. They sought review of an FPC determination certificating natural gas pipeline expansion into that state. In *other* dockets, the FPC certificated the producer sales to be made to the pipeline involved. In response to the petitioners' assertion of error on the part of FPC in not determining the "just and reasonable" producer rate in the pipeline proceeding (and, hopefully, fixing it so high as to render it non-competitive with fuel oil in Florida), the Court observed that: ". . . the Commission did not abuse its discretion in declining to consider the matter in the instant proceeding" (251 F. 2d at p. 646).

In *Oklahoma* a competitor pipeline purchaser in a gas field objected to FPC's unconditional certification of another's acquisition of gas from adjoining fields at prices higher than the going price in the area. It sought the determination of the Court of Appeals that Section 4 of the Natural Gas Act, with its "just and reasonable" rate standard, was, in legal effect, an integral part of Section 7 with (and superseding) its "public convenience and necessity" price standard. It too was told by the Court that: "The Commission cannot be required to convert every certificate proceeding into a rate proceeding" 257 F. 2d at p. 640.

We here dispute neither observation. It is *not* our contention—nor is it the tenor of the decision below—that it is incumbent upon the Commission to make a determination of "just and reasonable" rates as a prerequisite to the issuance of producer certificates—the whole thrust of petitioners' briefs herein to the contrary notwithstanding.*

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* Tenn. Br., pp. 2 (Question 1), 11, 12, 14-15, 20-22, 31, 37. CATCO Br., pp. 2 (Question 1), 10, 18, 26.

If rate regulation of producers had progressed beyond the preliminary, formative stage—and it might have if the Commission had received any cooperation from the producers in this respect during the past five years—that process might be available and practical in a Section 7 proceeding. It has not. It is not. We do not seek the impossible or the impractical. We do not seek to stultify the certificate process.

By the same token, however, we think that the lack of progress by the Commission in the discharge of its "just and reasonable" rate determinating obligations, under Sections 4 and 5, serves to emphasize the absolute necessity for its responsible reaction to initial price proposals of producer applicants under Section 7 which, its inquiry demonstrates, inevitably will be deleterious in their impact upon the second and each successive link in the interstate gas distribution chain. This, we think Section 7 requires anyway. The persistent Section 4 and Section 5 "just and reasonable" producer rate morass should provide emphatic impetus to rigorous discharge by the Commission of its responsibilities in each producer initial price certificate application it considers. And this, we think this Court should make abundantly plain to the Commission in its disposition of this case.

Herein, initially the Commission did demonstrate full cognizance of its price prerogatives and duties in a Section 7 proceeding and exercised them fairly and forcefully. Its April 22 order states:

> ". . . The importance of this issue in certificating this sale cannot easily be overemphasized. This is the largest reserve ever committed to one sale. This is the first sale from the newly developed offshore fields from which large proportions of future gas supplies will be taken. This is the highest price level

at which the sale of gas to Tennessee Gas has been proposed.

Those factors make it abundantly evident that, in the public interest, this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest. See *Cities Service Gas Co., Signal Oil and Gas Co.*, 14 F. P. C. , opinion No. 288, Nos. G-2569, G-2570, November 28, 1955, affirmed as *Signal Oil and Gas Co.* v. *F. P. C.*, 238 F. 2d 771 (CA 3), certiorari denied, 353 U. S. 923" (R. 835).

In its May 20 order the Commission imposed the 18 cent initial price condition upon these sales in clear reaffirmation and application of the judicially blessed *Signal* doctrine. It also reiterated the deficiencies of the present record:

> "As we have already stated, the record does not contain sufficient evidence on which to base a finding that the public convenience and necessity requires the sale of the gas *at that particular rate level.*" (R. 904, emphasis added.)

Under the circumstances, and under our conception of Section 7, the Commission had only one other alternative—viz. ". . . otherwise such application shall be denied." In its June 24, 1957 determination and order, however, the Commission did not exercise that alternative; it did not discharge its price limiting obligation; it did not exercise its price conditioning authority. Instead it summarily concluded that the record did, after all, support the determinations that:

> (a) ". . . the applicant is able and willing properly to do the acts and to perform the service proposed . . ." [conceded];
>
> (b) ". . . the applicant is able and willing . . . to conform to the provisions of [the Act] and the

requirements, rules, and regulations of the Commission . . ." [*quaere*, in the light of this record];

(c) "and that the proposed . . . sale . . . is or will be required by the present or future public convenience and necessity" [definitely *not*, at the initial price herein proposed].

The conclusion was founded upon (1) an assumed supervening necessity on the part of the public for gas at any price, and (2) a threat (unrealistic and unreasonable *per se*) to terminate the underlying contracts—both factors being deemed adequate bases for dispensing with further (any) concomitant consideration of the "prime determinant"—price. This we assert was fundamental error.

POINT II.

1. Threats to withhold gas from the interstate market add nothing to a Section 7 proceeding. Unless the requirements of that section are met in full, the application to introduce the gas into that market "shall be denied."

2. In any event, this particular threat was unrealistic, unreasonable, and wholly unsupported and hence afforded no basis for anything, much less for dispensing with the "prime determinant"—price.

We are fully cognizant of what may be deemed the Commission's general responsibility (*to be discharged within the confines of its statutory authority*) to so supervise the interstate natural gas industry that there will be adequate supplies of gas to supply consumer needs—i.e. *reasonable* supplies to supply *reasonable* needs and at *reasonable* prices. But, under the law, in the discharge of its duties

and responsibilities in Section 7 proceedings, the reasonableness of all three—supply, need and price—must be affirmatively demonstrated, precedent to entry of the gas involved into the interstate market, else (1) the permission to enter must be limited or conditioned in such a manner as will satisfy any evidentiary or other defects in the presentation or proposal, or (2) denied. By no other means may compliance with the law be effected. Hence the threat —at whatever stage uttered—to withdraw an application or to cancel a contract commitment or to divert the tendered gas elsewhere (all concededly within the applicant's power in each instance) adds absolutely nothing to a Section 7 proceeding and, perforce, should weigh absolutely *nil* upon the collective minds of those charged with the administration of the Natural Gas Act.

From its inception, that Act has clearly contemplated and relied upon *economic* compulsion or inspiration as sufficient inducement for the entry into the interstate market of reasonable quantities of natural gas. No means whereby the Commission may compel such devotion of that commodity has ever been prescribed by the Act. On the contrary, such disposition is expressly prohibited except under the statutorily prescribed requirements and conditions, which were carefully designed for the protection of those to be served. Should it ever develop (and we deny that it has) that such extra-statutory, economic impetus proves inadequate, and that further inspiration must be afforded to encourage production and delivery of additional supplies, Congress, not the Commission will have to face up to the problem. In the meantime, the Commission is not in a position to pre-empt that Congressional prerogative or to bargain away its statutory functions and duties with individual producers who fail to measure up to the require-

ments of the present law and attempt to evade them by threat, trick, cajolery or subterfuge.

The instant threat should have been ignored for yet another reason. It was most unrealistic. The CATCO applicants carefully avoided placing themselves in a position of having to substantiate it. *They* did not apply to the Commission for rehearing of its May 20 order—as they had done with respect to its April 22 order; *they* did not present any sworn statement in support of their threat to withdraw. Instead, the application for rehearing which resulted in the June 24 order was made by Tennessee—in the form of an hearsay allegation, based on statements made to Tennessee by the CATCO applicants that they would not comply with the Commission's May 20 conditions and would terminate the contracts unless the conditions were withdrawn. This was not evidence that the contracts would actually be terminated—it was pure hearsay, and: "Mere uncorroborated hearsay or rumor does not constitute substantial evidence." *Consolidated Edison Co.* v. *Labor Board,* 305 U. S. 197, 230.

Having refrained from making any direct representation to the Commission that they would cancel the contracts unless relieved from the conditions of the May 20 order, the CATCO applicants proceeded to the oral argument which constituted the "rehearing." The record of that rehearing is not before the Court, since it contained no *evidence,* but merely the *arguments* of counsel. But even in that discussion, the CATCO attorneys with careful circumspection avoided any definitive statement of the determination of their clients to withdraw this supply of gas from Tennessee and the interstate market. Each one indicated that the matter would have to be taken up by "the Board of Directors" or the final decision would have to be made by "management."

There is thus not a scintilla of proof in this record that the CATCO applicants (1) *could*, or (2) actually *would* take this drastic course. In order to carry out their unsupported threats—in order to be *able* to do so—they would have had to find an *intrastate* market for this vast supply of gas in the State of Louisiana. There is no evidence that any substantial part of this gas could be sold locally under conditions equally or more advantageous to the CATCO applicants than those provided by the terms of the Commission's May 20 order. On the contrary, as Commissioner Connole said: ". . . the very quantity of offshore gas affected by this decision makes it clear that the only practical market for gas of this kind for years to come is to the large consuming areas served by the long haul interstate pipelines" (R. 932). Any intimation that these wells would be capped or that the gas would be released to blow tremendous bubbles in the waters of the Gulf of Mexico, instead of being disposed of in the interstate market at 18 cents per Mfc, is sheer nonsense. Millions of dollars had been expended in exploration, drilling and recovery. The investment was providing no return. At 18 cents, the gas reserves here committed equate to $360 million! Furthermore, the Commission was told, the leaseholds had to be in production by 1958 or be in jeopardy (R. 26a-27a, 78a).

So much for the first of the two motivations and purported justifications for the Commission's final determination herein.

POINT III.

1. The need for gas cannot be evaluated separately or divorced from price.

2. The need for gas to supply proposed pipeline expansion requirements provides no basis for dispensing with further consideration of the "prime determinant"—price. If anything, it renders it even more imperative that unjustified price exactions be precluded at the threshold of the interstate transmission process.

3. In any event, the demonstration of such need in this record is wholly insubstantial.

> "... we are moved by the primary consideration that *the public served through the Tennessee Gas system is greatly in need of increased supplies of gas.* ... We are of the opinion that, in the circumstances of this case, in view of *the great demand for gas by customers of Tennessee Gas,* the price consideration should not be made the prime determinant of what the public convenience and necessity require." (R. 925, italics supplied.)

We respectfully submit that no amount of proof could warrant such a divorcement of inseparables, need and price. The need for natural gas at the pipeline level, the distributor level or the consumer level of the interstate transmission process cannot possibly be evaluated in a vacuum, divorced from its cost. It might properly be assumed that there is a continuing need for gas at *reasonable* prices at all three levels. But, just as the shopper's "need" for merchandise evaporates when the merchant sees him com-

ing and boosts the price, so does the need for gas evaporate when a price hold-up operation commences.

In the field of regulated utilities, the need for essential services and commodities is ever present. It is this need which gives rise to the regulation. And the regulation has as its primary purpose the prevention of price exploitation by monopolistic suppliers of the regulated services or rapacious purveyors of the vital commodities. Under such circumstances, to say that need out-weighs price considerations is but to abandon all semblance of regulation, or at least render it farcical.

We submit that the Commission was in error as a matter of law in purporting to separate the factors, purporting to balance them, and, upon finding considerations of need to be more impressive, discarding price as the "prime determinant" in this Section 7 proceeding.

Furthermore, and apart therefrom, in this instance the "need" side of the scale was very definitely lacking in weight. The proof reflected in this record relating to needs of the "public served through the Tennessee Gas system" is insubstantial; it affords inadequate support for the finding; and it in no way supports the determination to dispense with further consideration of the matter of price.

The *sole* evidence in this record of any need at all for this or any other gas in the interstate market is epitomized in the short statement of Tennessee's Vice-President, Mr. Witmer:

> "Q. Why did Tennessee Gas Transmission Company enter into those contracts? A. The purpose was to obtain gas reserves to supply the expansion of Tennessee's market, as is shown in Tennessee's pending application in Docket G-11107" (R. 46).

In its two previous orders, the Commission made no reference to any *other* need for gas. In its April 22 order,

it erroneously stated that the examiner "has found there is a need for these volumes of gas on the system of Tennessee . . . These findings we adopt" (R. 836, italics added). In its May 20 order, it merely stated that, in view of CATCO's refusal to accept the temporary certificate provided for in the April 22 order, it was modifying that order, *inter alia*: "In view of the need for the volumes of gas . . ." (R. 904). Finally, in the June 24 order, with no further discussion—with no further reference to the record—we progress from Tennessee's need for gas to fill up its contemplated additional pipelines, full swing to the "great need" for gas by "the public served through the Tennessee gas system."

The only explanation for the finding of this "great", price-supervening need for gas, contained in this record is a footnote appended to the Commission's April 22 order, in conjunction with its grant of a temporary certificate to Tennessee to construct the 107 miles of gathering pipeline to bring the CATCO gas ashore and to Kinder, Louisiana. This footnote reads:

> "By letter of March 29, 1957, Tennessee Gas was granted a temporary certificate for facilities covered by the same application in docket No. G-11107, but specifically excluding the 107 miles of pipeline referred to here" (R. 836).

Thus it appears that on the same date that the presiding examiner's report was issued in this case, the Commission issued a temporary certificate to Tennessee in Docket G-11107—a proceeding, the evidence here shows, related to "the expansion of Tennessee's market", to supply which expansion Tennessee had entered into the CATCO contracts. Thus it appears that the Commission having refused to consolidate Tennessee's application in Docket G-11107 with the present CATCO cases—proceeded by way of a

temporary certificate in Docket G-11107 to permit Tennessee to construct the facilities with which to "expand its market", and thereby established the "need" upon the basis of which the Commission subsequently predicated its abandonment of the "price consideration" as the "price determinant of what the public convenience and necessity require" in this case.

The unreasonableness of the Commission's June 27 order in this respect thus becomes plain. Having made *independent* determinations in respect of the two facts of need and price—(1) need, by the issuance of a temporary certificate to Tennessee in Docket No. G-11107 and (2) price, by withholding unconditional certificates to the CATCO applicants in its April 22 and May 20 orders—when thereafter faced with the CATCO threat to terminate the gas sales contracts, the Commission was caught on the horns of a dilemma of its own concoction. Either it had to tear up Tennessee's temporary certificate—and thus dispense with further consideration of the "need" for gas—*or* it had to knuckle under to the CATCO demands and thereby dispense with further consideration of the matter of price.

In getting itself into the dilemma in the first place and in its selection of the way out, we respectfully submit, the Commission's action was wholly unwarranted, arbitrary and capricious.

So much for the only other motivation and purported justification for the Commission's final determination herein.

POINT IV.

The judgment of the Court below was eminently correct.

The Court below did not dwell at length upon or determine with the definitiveness which we feel it deserves at the hands of this Court, what we believe is *the* crucial, vitally important aspect of this case. That is, the nature, scope and imperativeness of the Commission's statutory obligation with respect to the matter of price in the context of a producer certificate application under Section 7 of the Natural Gas Act.

The Court took note of (a) the authority of the Commission to attach reasonable conditions to its issuance of a producer certificate; (b) the practice of the Commission in imposing price (rate) conditions in pipeline certifications; (c) the intent of Congress in enacting Section 7 to bestow upon the Commission "full scope" in doing so; (d) the Commission's previous denomination of a producer's initial price as the "vital element" in his demonstration of public convenience and necessity; and, finally, (e) the Commission's professed policy of according "great weight" to initial rate matters. 257 F. 2d 721. It then observed:

> "While the commission *probably* should always consider the impact of the proposed initial rate in its determination of public convenience and necessity, we do not reach the question of whether the Commission *must fix the initial rate* when its inquiry demonstrates that there is a substantial question of the reasonableness of that initial rate. See Oklahoma Natural Gas Co. *v.* Federal Power Commission, and the dissenting opinion of Judge Bazelon, D. C. Cir., 257 F. 2d 634, 642.

> In the cases before us, the Commission has left no doubt of the importance and necessity of a consideration of the reasonableness of the proposed initial rate." 257 F. 2d 721-2 (emphasis supplied).

As has been demonstrated (*supra*, pp. 36-43), the Court's unfortunate use of the word "probably" in the first sentence of that statement and its neglect to "reach" the most important question the case presented, has served to lend solace to the Commission for its post-June 24, 1957, relegation of the troublesome matter of the producer's initial price to oblivion [*Matter of Hope Nat. Gas Co.*, 19 F. P. C. 405 (March 31, 1958); *Matter of Seaboard Oil Co.*, 19 F. P. C. 416 (March 31, 1958); *Matter of Sunray Mid-Continent Oil Co.*, 19 F. P. C. 618 (May 9, 1958); *Matter of Superior Oil Co.*, 19 F. P. C. 637 (May 9, 1958); *Matter of United Gas Pipe Line Co.*, 19 F. P. C. 931 (June 12, 1958)] and to lend impetus to its post-June 30, 1958 aiding, abetting and encouraging of the next boost in the producer price level in southern Louisiana from the instant 22.4¢ to 23.3¢ [*Matter of Transcontinental Gas Pipe Line Corp.*, 20 F. P. C. 264 (September 4, 1958)]—with 24.05¢ currently on the way [*Matter of Trunkline Gas Co.*, Docket No. G-15394 *et al.*].

However, the damage done is not irremediable. This case and *United Gas Improvement Co. and Philadelphia Electric Co.* v. *F. P. C.*, CA 3rd, No. 12,797; *Public Service Commission of New York* v. *F. P. C.*, CA 3rd, No. 12,805 (to be heard in June) encompass the major recent misapplications of Section 7 of the Natural Gas Act. It is not too late for this Court to restore that section to full stature (Point I, *supra*.). It is long past the time for judicial elevation to the pre-eminence they deserve of the views, observations and contentions in this respect of the

one voice in the wilderness (Commissioner Connole's) which has been heard persistently, forcefully and cogently, pointing out to the majority of the Commission the error of its ways.' [R. 930-34; 19 F. P. C. 410, 427, 561, 620, 639, 932; 20 F. P. C. 288—particularly the latter]. This we respectfully and urgently request of this Court.

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* The Court below accepted as well within the Commission's province its April 22 and May 20, 1957 expressions of "the importance and necessity of a consideration of the reasonableness of the proposed initial rate" (257 F. 2d 721-2) and went on from there to take note that: "It was only after the threat of withholding gas from the interstate market that the Commission retreated . . ." (257 F. 2d 722)—*retreated without refuting, rescinding or altering in the least* its previous solemn findings in this respect.

Obviously, the Commission "changed its mind" (CATCO Br., pp. 13, 39-41)—which in a proper case, of course, it has the power to do. *Cia Mexicana de Gas* v. *F. P. C.*, 167 F. 2d 804 (CA 5th, 1948). But a valid exercise of such power requires "some basis to indicate that it is reason and judgment that has brought about the change." *Dixie Carriers* v. *U. S.*, 143 F. Supp. 844, 854, (DC, S. D. Tex., 1956). There must be "basic facts [and] underlying reasons—leading the Commission intelligently and as a matter of deliberative judgment in good faith to contrary conclusions." *Amarillo-Borger Express* v. *U. S.*, 138 F. Supp. 411, 419 (DC, N. D. Tex., 1956). And, of course, as in the case of any determination, it must appear that "its final conclusion was supported by substantial evidence in the record taken as a whole." *Hudson River*

Day Line v. *U. S.*, 85 F. Supp. 225, 227 (DC, S. D. N. Y., 1949).

There was no change in the basic facts here. From the outset (by virtue of the Commission's March 29 temporary certificate issued in Docket No. G-11107), there was a "need", of sorts, for this gas by Tennessee. The Commission so found in its April 22 and May 20 orders—the only change made on June 24 was the superfluous addition of the characterization "great" and the attribution thereof to the public to be served by Tennessee. There had been no showing—at any time—that the unprecedently high price of 22.4 cents per Mcf. was in the public interest. On the contrary, such testimony and facts as are contained in the record abundantly demonstrate the contrary. As Commissioner Connole said: "No voice has been raised to dispute the facts that were set out so clearly in our Order of April 22, 1957. To my legal understanding, they are still facts" (R. 932).

Neither did the threat attributed to the CATCO applicants present a truly new factor. When the Commission on April 22 granted temporary certificates and remanded the case to the presiding examiner "to determine at what rates the public convenience and necessity requires these sales," in effect, it rejected these sales at the proposed price. When the CATCO applicants applied for rehearing of that order, they *then* refused to commit their gas to these sales on the Commission's terms. When the Commission imposed the conditions contained in its May 20 order, it *again* rejected the sales at the proposed price, unless the CATCO applicants would undertake in a subsequent Section 4 proceeding to establish that it was just and reasonable. CATCO's threatened refusal to accept the terms of that order, posed nothing new. The May 20

order itself contemplated the possibility of such a refusal—it required that the certificates "be accepted in writing and under oath within 30 days from the date of the issuance of this order . . ." (R. 908).

There being no change in the basic facts, the Commission's complete reversal of its previously adopted solemn determinations could only constitute an unsupportable and invalid "change of mind." It could not "make serious findings of this nature, and then without more, announce they no longer exist." *Amarillo-Borger Express* v. *U. S.*, 138 F. Supp. 411, 419 (DC N. D. Tex. 1956). This was not a rational, intelligent exercise of deliberative judgment supported by substantial evidence in the record taken as a whole. It was a reversal of previously adopted ultimate findings and conclusions, upon the wholly erroneous theory that price could properly be subordinated to the need for gas if withdrawal of newly pledged supplies is threatened by the pledgor. Of it, the Court below said:

> "The Commission has jurisdiction to issue certificates under Section 7 (e) based upon its independent judgment after an untrammelled consideration of all the elements which it deems necessary to arrive at that judgment. Congress has not given the Commission power to inquire into the issue of public convenience and necessity where, as here, the applicant circumscribes the scope of that inquiry by attaching a condition to its application requiring the Commission to forego the consideration of an element which may be necessary in the formulation of its judgment. Otherwise stated, the Commission has not been endowed by Congress with jurisdiction to conduct a *limited* inquiry . . ."
>
> "The Commission's function is to regulate the sale of gas by producers willing to sell under regulations arrived at in accordance with the provisions

> of the Act. Such regulations may not be the result of bargaining with an unwilling seller." 257 F. 2d 723.

In this, as in its final judgment, the Court below was absolutely right. In this, contrary to petitioners' insistence here that the Court labored under a "misapprehension" (Tenn. Br., pp. 17, 33; CATCO Br., pp. 12, 32-3), the Court was obviously well aware that no provision of the Natural Gas Act compels any producer to accept a certificate unsatisfactory to itself or to make a commitment to accept an unsatisfactory certificate as a condition precedent to the filing of an application. The Court was obviously aware that the CATCO applicants had it within their physical ability and legal right to make good their threats of withdrawal. They had reserved that power specifically in their contracts with Tennessee (R. 28, 287-8). They had—as had the Commission in the Court below—carefully emphasized the point in their briefs.

The Court below was simply not about to permit of perpetuation of the thesis of the Commission's June 24 order—*viz,* the greater the need of the consuming public for gas (as evidenced by the willingness of the pipeline supplier to pay a higher price than anyone else) the less important is the Commission's inquiry into the propriety of the price demanded; and, with the addition to that of a threat to withdraw new supplies, inquiry into the propriety of price may be abandoned altogether and—the inevitable consequences notwithstanding—relegated to the limbo of utterly ineffectual Section 5 proceedings.

The decision below, that the Commission had no authority (jurisdiction) to permit consideration of the threat factor (one *not* within the ambit of the statutory standard of public convenience and necessity) to supersede or

exclude the vital necessity for scrutiny of the propriety of the price (a consideration very definitely within that ambit), is in complete accord with the decisions of this and other Courts that an administrative agency, in the performance of a discretionary function, has no power to consider or rely upon matters which are outside the scope of, or irrelevant to, the statutory criteria upon which its discretion must properly be exercised and its decision must properly rest. See e.g. *Accardi* v. *Shaughnessy*, 347 U. S. 260 (1954), *Wolf* v. *Boyd*, 238 F. 2d 249, 254 (CA. 9th, 1956). And its denomination of that error as jurisdictional instead of an "abuse of discretion", "arbitrary, capricious" or "in excess of authority" is wholly immaterial here.

There simply is no substance to petitioners' assertions of error on the part of the Court below in raising an objection *sua sponte* in contravention of Section 19(b) of the Natural Gas Act (Tenn Br., pp. 19, 37-38; CATCO Br., pp. 7, 43-47).

The prohibition against resolution by appellate courts of issues not raised or brought to the attention of the lower tribunal (administrative or judicial) is designed to prevent the institution of unnecessary appeals, by compelling litigants to call all claimed error to the attention of that original body so that it may have the opportunity to consider, rule on and, if necessary, correct such error.

To satisfy the "objection" requirement of Section 19(b) of the Natural Gas Act (or a similarly worded statute or rule*) it is sufficient to identify the action, ruling or determination complained of and to set forth the reasons for the objection with sufficient clarity and specificity to enable

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* Identical or similar provisions are common in regulatory statutes and are akin to F. R. C. P. 46.

the Commission to appraise the objection and to take advantage of its opportunity to correct its own errors. *May Stores* v. *Labor Board*, 326 U. S. 376, 386, n. 5 (1945). This we did here in full.

Our application for rehearing of the Commission's order of June 24, 1957 stated:

> "The always-present power to reject unsatisfactory certificates and the threat to use that power has never, so far as we are aware, been thought to eliminate, modify or affect the proof required by statute to establish public convenience and necessity. It is inconceivable that it should be otherwise, or that public convenience and necessity should ever require or permit abject submission by a regulatory agency to any ultimatum of a regulated company. If the existence of the power to reject, accompanied by the threat to use it, could eliminate the necessity for proof of one 'vital element' (propriety of price) of convenience and necessity, it could as readily eliminate the necessity for proof of all other elements. It could justify the issuance of certificates on nothing more than an application together with a threat to reject any certificate which failed to grant everything the application demanded. . . ."
>
> . . . . . .
>
> "It may be quite true that under the Natural Gas Act the Commission is powerless to compel the dedication of additional gas to interstate commerce. We do not believe, however, that that fact permits emasculation of the provisions of the statute which direct the Commission to control and regulate, for the benefit of the consumer, the terms, conditions and prices at which interstate gas shall flow" (R. 538-539).

Our petition for review to the Court of Appeals stated:

> ". . . The only new factor involved in the final determination and the sole inspiration therefor was

the threat by the CATCO applicants to withdraw from their contracts with Tennessee and to withhold their gas from the interstate market.

"The record before the respondent did not justify the reversal of its previous orders upon the basis of such a threat. The abject submission of the respondent to that threat, in complete negation of its statutory responsibilities under the Natural Gas Act to protect the consumer interests, was unlawful, arbitrary and capricious" (R. 483).

Petitioners' insistence that these statements did not provide an adequate statutory basis for the decision of the Court below rests upon a strained and unsupported construction of the word "objection" and betrays a complete misconception of the practical function the objection is intended to serve. It cannot be seriously suggested that the Commission was denied an opportunity to reconsider the merits of its decision because of the absence of an argument, in *haec verba*, directed to its "jurisdiction" as distinguished from its authority. The duty to voice an objection and state the grounds therefor does not require the complaining party, at its peril, to affix the correct adjective label to the erroneous action or decision complained of. Nor does it compel the reviewing court to choose between (1) unqualified adoption of the legal conclusions contained in that party's application for rehearing or (2) affirmance of the erroneous decision. The cases cited by petitioners do not so hold. Therein the issue was the failure of the complainants to object before the Commission to the particular *action* sought to be reviewed in Court, not the adequacy or inadequacy of its description of the *legal effect* of that action.

Every court, including this one, may, often does, and indeed must be free to decide cases on legal principles

which vary to a greater or lesser extent from the precise formulations urged on them by the successful party. (See, for example, *U. S.* v. *Shaughnessy*, 206 F. 2d 897, 900, (CA 2d. 1953), *rev. sub nom, Accardi* v. *Shaughnessy* (1954), 347 U. S. 260, 268). It would, we submit, encase the law in a strait-jacket of impossible severity, if courts were precluded from holding that actions complained of were not only unlawful but were unlawful for reasons graver and more fundamental than the complainant advanced.

Conclusion.

For the foregoing reasons it is respectfully submitted that the judgment below should be affirmed, with a definitive answer by this Court to each of the questions herein presented, for the guidance of the Commission upon remand.

Respectfully submitted,

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April 9, 1959.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

Nos. 518 AND 536

THE ATLANTIC REFINING COMPANY, ET AL.,
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Respondents.

TENNESSEE GAS TRANSMISSION COMPANY,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, LONG ISLAND LIGHTING COMPANY and PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENTS LONG ISLAND LIGHTING COMPANY AND PUBLIC SERVICE ELECTRIC AND GAS COMPANY

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April 8, 1959

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

Nos. 518 AND 536

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BRIEF FOR RESPONDENTS LONG ISLAND LIGHTING COMPANY AND PUBLIC SERVICE ELECTRIC AND GAS COMPANY

Opinions Below

The opinion of the Court of Appeals (R. 653-662) is reported at 257 F. 2d 717. The opinion of the Federal Power Commission (R. 484-497) is reported at 17 F.P.C. 880.

Jurisdiction

The judgment of the Court of Appeals was entered on June 30, 1958 (R. 663). Petitions for rehearing were denied on August 27, 1958 (R. 666-667). The petitions for writs of certiorari were filed on November 14, 1958 (No. 518) and on November 24, 1958 (No. 536) and were granted on January 12, 1959 (R. 669). The jurisdiction of this Court rests on 28 U.S.C. §1254(1) and §19(b) of the Natural Gas Act, 52 Stat. 831 (1938), as amended by 72 Stat. 947 (1958), 15 U.S.C. §717r(b).

Statutes Involved

The pertinent provisions of the Natural Gas Act, 52 Stat. 821 (1938) as amended by 56 Stat. 83 (1942), 15 U.S.C. §§717-717w are set out in the Appendix, *infra*.

Question Presented

The FPC twice refused to authorize the sale of natural gas at an initial price of 21.4 cents per mcf (which was over 25% higher than the highest price theretofore paid by the pipeline buyer and which set a new high price level for the southwestern United States) because the record was deficient to show that the public interest required the sale at that price, as required by §7 of the Act. Did the FPC err subsequently when, on the identical record, it bowed to the producers' threats to withhold the gas, ignored procedures available under the Act offering complete price protection to the consuming public as well as to the producers, and entailing no administrative disadvantage, and unconditionally authorized the sale at the price demanded by the producers?

Statement

This case results from separate applications to the FPC late in 1956 by the CATCO companies[1] for certificates of public convenience and necessity under §7 of the Natural Gas Act for the sale of natural gas to Tennessee Gas Transmission Company[2] at an initial price of 21.4 cents per mcf.[3] Twice having held that "the record does not contain sufficient evidence on which to base a finding that the public convenience and necessity requires the sale of the gas at that particular rate level [21.4 cents]" (R. 612, 604), the FPC finally yielded to CATCO's concerted threats to withhold the gas unless permitted to receive that price without liability for a refund if the price proves to be unlawful, and granted the certificates unconditionally on the identical evidence and without withdrawing its earlier findings (R. 570-574). The Court below reversed (R. 653-662).

CATCO dedicated up to 2 trillion cubic feet of natural gas (R. 25a) from leases off the Louisiana shore in the Gulf of Mexico (R. 23a) to the sale. This is the largest reserve ever committed to one sale (R. 521). The initial price of 21.4 cents is more than 25% higher than the highest price paid by Tennessee for gas in the entire southwest (R. 216a), including offshore gas (R. 150a-151a), 70% higher than Tennessee's weighted average cost

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[1] Continental Oil Company (Docket G-11024), The Atlantic Refining Company (Docket G-11034), Tidewater Oil Company (Docket G-11049) and Cities Service Production Company (Docket G-11046). These dockets were consolidated for hearing.

[2] An interstate pipeline company hereinafter referred to as "Tennessee". In September, 1956, Tennessee applied for a certificate to expand its facilities, which expansion the CATCO gas was intended to supply. This application (Docket G-11107) was not consolidated with the CATCO applications. No final order was made in this proceeding until January 28, 1959, when the application was granted in major part.

[3] This price excludes reimbursement for Louisiana gathering and severance taxes.

of gas (R. 44a), and more than 100% greater than the price paid by Tennessee elsewhere in southern Louisiana (R. 149a). The contracts provide for price escalations of 2 cents per mcf each 4 years to a maximum price of 35.4 cents per mcf (R. 310a). These escalations are steeper than those in any of Tennesee's existing contracts (R. 214a). Favored nations and price redetermination clauses (R. 91a-92a)[4] can further increase the CATCO charges. Additionally, CATCO can remove for its own use up to 10% by volume of the gas sold to Tennessee and Tennessee is required to transport this amount of gas for CATCO to an onshore point without charge (R. 300a-301a).

Hearings were held on February 28 and March 1, 1957. Long Island Lighting Company and Public Service Electric and Gas Company, purchasers of natural gas from Tennessee, and the New York Public Service Commission intervened (R. 330a-331a), and all participated fully.

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[4] The favored nations clauses provide that if Tennessee were to purchase other gas in a certain area at a higher price, the CATCO contracts would automatically escalate to the higher price. The price redetermination clauses provide for redetermination (but only upward) of the CATCO price on the basis of the three highest prices paid in the pricing area.

The CATCO agreements as filed with the CATCO applications did not contain such clauses and the existence of any amendatory agreements bearing on price was actually denied (R. 85a). On cross-examination, however, it developed that the CATCO contracts had each been materially amended. The favored nations and price redetermination clauses were added by letter agreements in either of two cases: if the FPC accepts and allows a producer rate increase resulting from the operation of such clauses in a similar contract or if the law should be changed to provide that the FPC has no jurisdiction over the producers' price to a transmission company (R. 91a-92a). Such clauses would be operative south of a line plotted on a map attached to the letter agreements or, if a boundary dispute between Louisiana and the United States relating to the off-shore lands is settled, such clauses would be operative south of the southerly boundary of Louisiana so determined (R. 92a).

[5] Hereinafter sometimes referred to as "LILCO", "Public Service" and "PSC", respectively.

The Evidence

The CATCO price was set in a seller's market (R. 41a-42a, 201a); it was unprecedented (R. 216a) and the economic consequences resulting from certification of the huge package of gas involved are enormous.[6] The only price justification attempted by CATCO in the skimpy record it made is that the price was set by bargaining at arm's length (R. 43a). Indeed, the only fact adduced by the applicants even tending to show that the sale might be in the public interest was that a large package of gas was involved (R. 41a-42a). No evidence whatsoever was introduced on the subject of need for the gas.

CATCO presented only one witness (R. 70a-71a), a regional land superintendent for Continental, who sponsored the virtually identical (R. 21a-22a, 23a) CATCO agreements with Tennessee (R. 20a). His duties related to the acquisition, development and disposition of leases (R. 72a), including the clearing of title, the preparation of deeds and the negotiation of contracts with companies jointly interested (R. 73a). He testified that he had no responsibility for entering into gas sales agreements (R. 79a) and did not in fact negotiate them (R. 67a, 80a).

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[6] The cost per day of the initial quantity of gas involved is $39,200 and the annual cost is $14,308,000. If the initial price were 17 cents, which the FPC at one stage herein felt was in the public interest (see p. 10, *infra*) the cost to consumers over the life of the contracts would be at least $56,210,000 less.

Not the least of the consequences is the possible triggering of price increases which could result from approval of the CATCO price. Tennessee has contracts covering gas purchases at slightly more than 10 cents per mcf in southern Louisiana. These contracts contain two party favored nations and price redetermination clauses (R. 149a) under which, if Tennessee were to purchase other gas in the same area, the contract prices would be escalated. Although CATCO categorically states in its brief that the sale will not trigger favored nations or price redetermination clauses, CATCO Brief, pp. 4, 25, 29, Tennessee's witness, while under oath at the hearing, was unable to give such assurance (R. 148a-159a).

Moreover, he could not interpret them (R. 66a-67a, 84a). These four agreements are for a 20 year term (R. 316a) and call for deliveries, at offshore platforms or other mutually agreed points (R. 304a), of 175,000 mcf per day the first year (R. 289a), and 240,000 mcf per day thereafter (R. 210a). Initial deliveries were originally scheduled for November 1, 1957 (R. 25a), until the time was extended. Failure to place the reserves in production by 1958 might have jeopardized the leases (R. 26a-27a).[7]

Facilities to carry the gas from the offshore platforms to an existing transmission line owned by Tennessee are to be built by Tennessee at a cost of approximately $16.3 million (R. 46a).

Tennessee, in support of the CATCO applications presented two witnesses, the director of its reserve department (R. 32a) who estimated the CATCO reserve to be 11 or 12% of Tennessee's total (R. 139a-140a),[8] and its vice president in charge of gas purchases (R. 40a), who negotiated the CATCO agreements on Tennessee's behalf (R. 41a)

> "* * * to obtain gas reserves to supply the expansion of Tennessee's markets, as is shown in Tennessee's pending application in Docket G-11107."

Additional factors considered by Tennessee were that the gas reserves are well located and are large; and Tennessee might acquire additional reserves to be developed in the area in the future (R. 41a-42a). He acknowledged that the CATCO gas would raise Tennessee's weighted average cost of gas approximately 1 cent (R. 45a)—some 8%, but

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[7] Deliveries of gas by CATCO to Tennessee have actually begun.

[8] There was no cross examination on the adequacy of the reserves because intervenors were not shown the working papers underlying the computation of the reserves and the issue was deferred to the Docket G-11107 proceedings (R. 123a, 129a-130a).

he refused, with the approval of the hearing examiner, to present the working papers underlying this computation (R. 204a-205a). Attempts to elicit meaningful price data were actually frustrated. Thus, although it would appear that the actual cost to Tennessee of the CATCO gas will be in excess of 25 cents per mcf because of the cost to Tennessee of the gathering facilities, Tennessee's vice president stated he had not considered the matter (R. 196a) and would neither confirm this estimate nor give any estimate of his own (R. 225a-226a).[9]

Although he stated that the initial price in the CATCO contracts, "by itself," would not cause a rate increase filing by Tennessee (R. 202a), he acknowledged that he had no responsibility for Tennessee's rate filings and had made no study of the subject (R. 202a-203a).[10]

FPC Action

1. Hearing Examiner's Decision

On March 29, 1957[11] the hearing examiner issued his decision (R. 498-518). He pointed out that (R. 509)

> "* * * Tennessee's purpose was to obtain gas reserves to supply the expansion of Tennessee's

[9] This estimate was derived by taking the cost to Tennessee of the gathering facilities and then computing depreciation, return and tax on return to get an annual cost which, when applied to the annual volume of gas to be put through these facilities, produced an indicated cost per mcf more than 3 cents greater than the contract price.

[10] These hedging responses are understandable: Since the CATCO deliveries commenced Tennessee has filed an application with the FPC for higher rates designed to produce $19,18 ,000 additional revenue annually. Tennessee claims the additional revenue is needed because of the higher field prices it must pay for gas, *including the CATCO gas. Tennessee Gas Transmission Co.*, Docket G-17166 (application filed November 14, 1958). Thus, the CATCO assertion: "Nor will the proposed price cause Tennessee to request an increase in its rates (R. 202)," CATCO Brief, p. 29, is inaccurate.

[11] The same day, the FPC issued its order denying a motion to consolidate Tennessee's application for a certificate (Docket G-11107)

> market as shown in Tennessee's pending application in Docket G-11107. None of the data which it is assumed was filed in support of such application is in evidence in this proceeding."

and that (R. 516)

> "• • • any finding to the effect that public convenience and necessity requires or will require the issuance of certificates to Applicants in this proceeding would be confronted with the fact that a contrary finding made with respect to Tennessee's application for a certificate which is pending in Docket No. G-11,107 would be in fact in conflict as Tennessee proposes to use the reserves which are the subject of this proceeding in connection with its expansion program which is the subject of its application in G-11,107."

Accordingly, he granted the requested certificates, but conditioned the grant on Tennessee's receiving authorization in G-11107 to construct the facilities there requested (R. 518).

2. The FPC's First Order

On April 22, 1957 the FPC reversed its hearing examiner. It found (R. 521):

> "The record contains insufficent evidence or testimony, however, on which to base a finding that the public convenience and necessity requires the sale of these volumes of gas at the particular rate level

to expand its system's capacity despite the fact that the avowed purpose of the purchase from CATCO was to supply this expansion. It did, however, consolidate Docket G-11107 with 19 other dockets unrelated to CATCO. *American Louisiana Pipeline Co.*, Docket G-2306. Hearings therein did not even begin until May 14, 1957, shortly before the FPC's second order in CATCO (see pp. 10-11, *infra*). No final order was issued by the FPC in Docket G-11107 until January 28, 1959.

here proposed. The importance of this issue in certificating this sale cannot easily be overemphasized. This is the largest reserve ever committed to one sale. This is the first sale from the newly developed offshore fields from which large proportions of future gas supplies will be taken. This is the highest price level at which the sale of gas to Tennessee Gas has been proposed.

"Those factors make it abundantly evident that, in the public interest, this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest. See Cities Service Gas Co., Signal Oil and Gas Co., 14 F.P.C. ———, opinion No. 288, Nos. G-2569, G-2570, November 28, 1955, affirmed as *Signal Oil and Gas Co.* v. *F.P.C.*, 238 F. 2d 771 (CA 3), certiorari denied, 353 U. S. 923."[12] (Emphasis added)

The FPC granted CATCO a temporary certificate (R. 523) and remanded the proceedings to the hearing examiner (R. 524)

"• • • to determine at what rate the public convenience and necessity requires the sale of natural gas by CATCO to Tennessee Gas to be made if these CATCO companies are granted permanent certificates of public convenience and necessity."

3. The FPC's Second Order

CATCO moved for modification of the first order, allegedly because it (R. 527)

[12] In *Signal*, 12 P.U.R. 3d 3, the FPC held that the public interest in just and reasonable prices could not be protected by deferring consideration of the appropriateness of the proposed initial price of 12 cents to a §5(a) proceeding. Accordingly, since the applicant had not supported the 12 cent price and since that price would have disrupted the 10 cent price pattern prevailing in the area, the FPC conditioned its certificate on Signal's charging only 10 cents.

"Signal" and *Cities Service"* are used interchangeably throughout this brief.

> "• • • could not present sufficient evidence at the hearing ["to determine at what rate the public convenience and necessity requires the sale of natural gas by CATCO to Tennessee Gas to be made if these CATCO companies are granted permanent certificates of public convenience and necessity"] contemplated by the Commission's order within any reasonable period in the future and could not afford to commence construction until at least the initial rate question is resolved."

On May 20, 1957, the FPC issued its second order. It reiterated that (R. 528)

> "• • • the record does not contain sufficient evidence on which to base a finding that the public convenience and necessity requires the sale of the gas at the particular rate level."

To satisfy the "need" for the gas and at the same time to "insure that the interests of consumers are protected not only as to the future prices, but as to the *initial* price" (R. 528) (emphasis added) and to assure CATCO "of receiving the proper price under standards of the Act" (R. 529), the FPC devised an equitable solution:

1. It granted permanent certificates to CATCO.

2. It conditioned the grant on CATCO's acceptance of an initial price of 17 cents (the highest price theretofore paid by Tennessee).

3. It committed itself to permit escalation of the 17 cent price to 21.4 cents one day after commencement of deliveries of gas, the increased amount to be collected under bond subject to proof of its reasonableness (in subsequent proceedings under §4 of the Act).

The second order thus gave CATCO all it could reasonably ask. If CATCO could ultimately justify the 21.4 cent

price it would retain the entire amount. On the other hand, if a lesser amount were shown to be just and reasonable, consumers would be reimbursed the difference between that amount and the 21.4 cent price.

As a matter of fact, only the consumers might be hurt under the second order. If, for example, the just and reasonable price ultimately were determined to be 13 cents, the consumers' protection would be incomplete to the extent of 4 cents, the difference between the permitted price of 17 cents and the just and reasonable 13 cents. Thus, the second order was actually favorable to CATCO.[13]

4. The FPC's Third Order

Tennessee (but not CATCO) sought rehearing for the purpose of informing the FPC of CATCO's unwillingness to accept the second order (R. 418a).

Oral argument was permitted, and the FPC on June 24, 1957, on the identical record previously before it, yielded to the CATCO threat to withhold the gas and entered the order under review. It did not withdraw its earlier findings but explained the retreat from its earlier attempts to insure fairness to all as motivated "by the primary consideration that the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas." Confronted with the unwillingness of CATCO to accept any but the contract rate, and in view of "the fact that the record does not show that the 21.4

[13] To avoid loss of control over subsequent price increases in the event of the passage of the Harris Bill, H. R. 6790, 85th Congress, which if enacted would have eliminated FPC jurisdiction over contract clauses specifying definite price escalations, the FPC also ordered modification of the CATCO contracts to provide for indefinite price increases which would be governed by "reasonable market price" (R. 531-532). This modification had been offered by CATCO in an attempt to salvage unconditionally the 21.4 cent initial price.

cent rate is *necessarily*[14] excessive," the FPC felt that it could "adequately protect the public interest with respect to the matter of price" in proceedings under §§4 and 5(a). The third order therefore unconditionally authorized the CATCO sale and noted that the price "will be subject to rate investigations [under §5(a)] now outstanding against * * * [the CATCO companies]" (R. 487-488).[15]

Three commissioners voted for this order. Commissioner Connole dissented. He stated (R. 496):

> "Nothing but threats by the producers supports the proposition that this gas would be barred forever from the interstate market. And the very quantity of offshore gas affected by the decision makes it clear that the only practical market for gas of this kind for years to come is the large consuming areas served by the long haul interstate pipelines.[16] In

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[14] Tennessee quotes from the third order, as follows: "* * * the Commission found that 'the record does not show that the 21.4 cent price is excessive.'" Tennessee Brief, p. 9. It must be noted that the omission of "*necessarily*" from the quotation distorts the finding of the FPC.

[15] The FPC was relying on then pending separate §5(a) proceedings involving the CATCO companies. Now, more than 19 months later, the proceedings involving Continental (Docket G-16966) and Tidewater (Dockets G-9932 and 13310) are still preoccupied with *1955* rates and costs; the CATCO sales have not been considered, and there is no indication when they will be considered, if ever. The producers have presented no evidence bearing on the reasonableness of the CATCO rate; neither has the FPC's staff, which apparently does not regard the third order as a mandate to investigate the CATCO rate. Continental has moved to dismiss the §5(a) proceeding involving it.

In its §5(a) proceeding, Docket G-9510, Cities Service has completed its direct case. It limited itself to a 1957 test year, which was prior to the commencement of the CATCO service. Further proceedings are not scheduled until September, 1959.

The Atlantic §5(a) proceeding, Dockets G-9283 and 9284, have never been set down for hearing.

[16] The impracticality of the CATCO threat is revealed by the recent history of natural gas usage. In 1951 marketed production of natural gas exceeded 7.45 trillion cubic feet. Of this amount over

my judgment the pricing pattern should not be set for so crucial a supply source in an atmosphere charged with urgency and in response to arguments whose primary motivation is private, not public, gain. The election by the producers to reject their public responsibility and insist on exercising the full strength of their bargaining position has altered completely the impact of logical and equitable arguments.

* * * * *

"In my opinion, the consequences of abandoning our position will be more serious than their effect on this particular sale. Whether by design or accident, the issues in this proceeding now transcend the close limits of the original hearing. At stake is the question whether the Commission should hold a position which it has determined is in the long run public interest, or whether it should abandon it when confronted with allegations that short run injury to one segment of the industry and consumers might result. When the issue is reduced to this simple statement, the answer is clear."

Rehearing was denied August 15, 1957 (R. 541-542).

The FPC thus abandoned the second order, not because of any asserted unfairness to CATCO, but simply because CATCO would not accept it; CATCO insisted that it would neither prove in the certificate case that it was entitled to the high price, nor permit that determination to be made in a rate increase proceeding under §4 where

3.24 trillion cubic feet, or 43.5%, were shipped interstate. Bureau of Mines, *Minerals Yearbook 1951*, p. 881. By 1957 marketed production had exceeded 10.68 trillion cubic feet, of which amount 6.05 trillion cubic feet, or 56.7%, were shipped interstate. Bureau of Mines, *Mineral Market Report MMS No. 2833*. Thus, in this seven-year period, interstate shipments increased 86.6%, whereas intrastate use increased less than 10%.

refunds would have to be made if the price could not be justified. On the appeals of LILCO and Public Service, and of the PSC, the Court of Appeals for the Third Circuit unanimously reversed and remanded the proceedings. 257 F. 2d 717 (R. 653-662). It held (1) that the FPC was not authorized by the Act to decide whether public convenience and necessity required the sale without protecting the public on the question of price; it was not free to conduct the "limited inquiry" whether the sale was in the public interest *except for price;* and (2) that CATCO had demonstrated its unwillingness to conform to the requirements of the Act and therefore was not entitled to the requested certificate.

Rehearing was denied on August 27, 1958 (R. 667), and petitions for certiorari were filed thereafter by CATCO and Tennessee. Respondents LILCO and Public Service, as well as the PSC, prevailing parties below, urged the granting of certiorari because of the urgent need for a definition by this Court of the FPC's responsibilities under §7 of the Natural Gas Act. Although the decision below reversed its order, the FPC took no position on the petitions and did not itself petition this Court for review. Certiorari was granted on January 12, 1959 (R. 669).

Summary of Argument

This is not a case where there is a settled system of regulation, applied to an industry which accepts it. We have an unusual regulatory situation, in that the system of determining producer rates is being fashioned at the same time that the natural gas industry is expanding very rapidly, resulting in a seller's market and skyrocketing prices. Rate cases can take a long time. It is therefore necessary to devise techniques which will enable the expansion of the industry to take place at the same

time that regulatory principles are being worked out, without hurting the public interest in not paying more than just and reasonable rates or the producer interest in not receiving less than that amount. There are several possibilities:

(a) Leave determination of the reasonableness of producer initial rates to §5(a) proceedings, as CATCO and Tennessee urge. But this will take years, and is unfair to the public because the §5(a) decisions can have no retroactive effect. In the meantime natural gas costs are skyrocketing.

(b) Convert every certificate case into a rate case. (This is the position which petitioners incorrectly claim we take.) But this would be needless—many of these cases are very small, and most of them do not raise any serious price question.

(c) Where there is a serious price question, either (1) turn the certificate case into a rate case if there is time, or (2) apply one of the many other types of price conditions which the FPC has evolved over the years, such as the CATCO second order, which can hurt nobody.

This third possibility is the one we urge; and by "serious price question" we mean a price that appears high in light of the existing pattern of prices, having in mind such related questions as the volume of the sale, effect on consumers and the possible presence of triggering.

We urge four points in this brief. First, that the FPC's decision was an abandonment of protection of consumers against excessive initial rates, an abandonment forbidden by the Act. Second, that the FPC's whole approach to initial rates is an evasion of its responsibility. Third, that this abandonment and evasion cannot be justified on

grounds of administrative convenience, or Fourth, on the ground of any real "need" of Tennessee for the gas.

I

The FPC twice here held that "the record does not contain sufficient evidence on which to base a finding that the public convenience and necessity requires the sale of the gas at" 21.4 cents, as contrasted with the previous high of 17 cents. Nevertheless, when CATCO threatened to withhold the gas from the interstate market unless permitted unconditionally to receive that price (which had been exacted in a seller's market) the FPC yielded to the threat, discarded its second order which gave effective price protection to all the parties and sanctioned this new high price without requiring any indication whatever of its reasonableness.

We argue that with the reasonableness of the proposed price seriously in issue, this abandonment by the FPC of effective price protection for consumers was error. It was error in light of the plain mandate of §4(a) of the Act that "All rates and charges * * * shall be just and reasonable", a provision which is at the very core of the Act and in light of which all its other provisions must be interpreted. §5(a) does not protect the public against excessive initial rates because it contains no provisions for refunds of the excessive amounts, a fatal defect in view of the FPC's conviction (which we share) that these rate cases will take a very long time. But the relevant legislative history shows that §7 was intended to permit the FPC to scrutinize proposed rates at a time when revision in the public interest would be effective rather than at a later stage when it would not be.

II

In pipeline certificate cases, the FPC has for many years construed §7 as requiring scrutiny of initial rates, and imposing a burden of proof on the applicant for the certificate. Many techniques have been developed by the FPC in these cases, to protect the public against excessive initial rates. We do not suggest that every producer certificate case be turned into a rate case; but the FPC's practice, exemplified by this case, of limiting its investigation of producer initial rates to the sole question whether they were determined by arm's length bargaining, has done violence to the primary purpose of the Act by abetting exploitation of the public by producers.

The FPC has set up criteria as to when the public is entitled to protection against initial producer rates, and then changed the criteria when the next case met them, finally arriving at a standard which at best affords practically no protection, and anyway is not applied in fact. CATCO exemplifies this.

III

The FPC seeks to defend its policy of deferring consumer protection to §5(a) cases, on the ground of administrative convenience. But in fact it is administratively *more* difficult to handle the problem in that way, as the Commission has conceded in *Cities Service Gas Co.*, 12 P.U.R. 3(d) 3, 15 (1955); *aff'd sub nom. Signal Oil & Gas Co. v. FPC*, 238 F. 2d 771 (3d Cir. 1956), *cert. denied*, 353 U. S. 923 (1957); and meanwhile the public is forced to pay excessive rates.

IV

Only a single statement in the entire record even remotely relates to Tennessee's "need" for the CATCO gas. Tennessee said it made the CATCO contracts "to

supply the expansion of Tennessee's markets, as is shown in Tennessee's pending application in Docket G-11107" (R. 41a).

We do not argue that a "need" of the public for additional gas could never be so great that price considerations should be superseded. That question is not reached here. The point is that the FPC's treatment of "need" in relation to price protection will not withstand analysis.

Assuming that need may be balanced against price in deciding where the paramount public interest lies, the degree of "need" at a price, and the effect of that price on old and new consumers, are to a great extent capable of measurement. However, the record here does not contain the facts which permit any such measurements. The FPC was therefore unable, in its third order, to make findings which evince a rational balancing of the competing factors. The conclusion of need contained in the third order is not supported and is not supportable.

It may be argued that "need" can be inferred from the very existence of the CATCO contract. For, unless Tennessee would have some use for the gas—here expansion—it would not have been willing to buy it. But, every §7 proceeding results from a desire to expand, and an existing contract is an indispensable requisite. This expansion by Tennessee (at the expense of other pipelines which sought but did not get the CATCO gas) was in its business interest, which can hardly be equated with the public interest.

Tennessee's gas purchase costs are part of its cost of service and are considered in fixing Tennessee's rates. Once the FPC certifies a sale to a pipeline, it will not permit the price to be collaterally attacked in a pipeline rate case. See order of FPC issued July 14, 1953 in *Tennessee Gas Transmission Co.*, Docket G-5259. Thus there is little if any compulsion on a pipeline to bargain hard on price.

If the "need" the FPC talks of in this case is this garden variety desire-to-expand type of need, then the FPC has made it clear that price is always a minor consideration, a consideration which will be finessed if the applicant so demands. It must be noted that the greater the need of the pipeline, the greater the price which can be exacted by the producer, and the greater the price protection required by the public. Yet in just such a circumstance the greater the FPC's willingness to forego price consideration.

Unless §7 proceedings are to be reduced to mere formalities, the existence of a contract can not be held to be evidence of such need as would permit effective price consideration to be ignored.

* * * * *

What is suggested is that the FPC must take reasonable steps to safeguard the public interest in a just price when it is asked to grant a certificate under §7. Only at that juncture can protection be afforded. The FPC has practical methods of accomplishing this whenever there is reason to believe that the proposed rate may not be within the range of reasonableness. It may require the producer applicant to present such meaningful data bearing on the justness and reasonableness of the initial price as could result in a valid finding in the §7 proceeding that the public interest requires the grant of the requested certificate at the proposed price. Or, if such data are not presented, it may employ some technique among the battery of techniques at its command to authorize the sale, and yet insure that the public will not be harmed until such time as the justness and reasonableness of the initial rate can eventually be determined.

Here the FPC did not require CATCO to present meaningful price data, and CATCO did not do so voluntarily.

The 21.4 cent price was not shown to be in the public interest and the FPC so held. In this posture of the case, the FPC was not free to sanction the 21.4 price. The FPC should have resorted to the second alternative and, indeed, it did so prior to making the order under review and arrived at two successive feasible solutions.

Its first order granting a temporary certificate permitted prompt construction of facilities necessary for the sale while at the same time making provision for the determination of a rate which would be in the public interest prior to the granting of a permanent certificate. When CATCO objected to this fair solution, the FPC was most accommodating. It withdrew the first order and issued the second order.

By the FPC's second order herein—setting a 17 cent price and permitting escalation to 21.4 cents one day later under bond—it guaranteed fairness to all concerned.

The first and second orders permitted prompt gas delivery and it deferred price consideration to a future hearing; the third order now under review did the same. All of these orders envisage further administrative action with respect to price. The difference is that the abandoned first and second orders assure price protection to both producers and consumers; the third order does not.

CATCO and Tennessee urge that the FPC is not required to convert every certificate case into a rate case; that to do so would be to bog down the regulatory process. We agree. But this argument is irrelevant. There is no issue of administrative convenience in this case. The issue is the FPC's freedom to forego effective protection of the public interest in just prices.

ARGUMENT

I

The Natural Gas Act was intended to provide protection to the public against unjust gas rates. With the proposed price seriously in issue, the FPC violated its duty under the Act in authorizing the CATCO sale unconditionally.

In 1954, the year this Court affirmed the existence of FPC jurisdiction over sales by producers of natural gas,[17] the average price for natural gas sold by producers in Louisiana to pipelines was 9.7 cents per mcf; in 1955 it was 11.2 cents; in 1956 it was 12.4 cents; in 1957 it was 14.2 cents.[18] In a recent six-month period the highest price paid in southern Louisiana vaulted from 17 cents to 21.3 cents.[19] The new proposed price for the same area is over 23 cents[20] and this plateau will inevitably and shortly be dwarfed if the FPC is permitted to persist in its refusal to regulate initial prices. It is a well understood fact of life in the natural gas industry that each new high price for gas becomes the effective price floor in future negotiations.[21] It is against this background of galloping

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[17] In *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672.

[18] Direct Sales by Producers of Natural Gas to Reporting Interstate Natural Gas Pipeline Companies—1957 (undated pamphlet issued by FPC), p. 5.

[19] *Superior Oil Co.*, 19 F.P.C. 637, 639 (1958) (dissenting opinion of Commissioner Connole).

[20] *Transcontinental Gas Pipe Line Corp.*, 20 F.P.C. 262 (1958), *appeal pending sub nom. United Gas Improvement Co.* v. *FPC* (3d Cir. No. 12797).

[21] In *Superior Oil Co.*, 19 F.P.C. 637, 639 (1958) the following testimony is quoted:

> "GENEAU [FPC staff counsel]: Is it your understanding that the highest price being paid for gas by any other pipeline company in the area is determinative of what price is asked?

price inflation and the aims of the Act "to create a comprehensive and effective regulatory scheme"[22] and "to protect consumers against exploitation at the hands of natural gas companies"[23] that the validity of the FPC's hands-off policy toward initial prices in CATCO and in other cases should be weighed.[24]

A. The FPC abandoned consumer price safeguards at CATCO's insistence, and the Court below properly reversed.

The sale by CATCO involves the largest reserve ever committed to one sale (R. 521). The proposed initial price, which the FPC's third order sanctioned without proof of its justness and reasonableness, is over 25% higher than Tennessee had committed itself to pay anywhere else (R. 216a), about 70% higher than Tennessee's weighted average cost of gas (R. 44a) and more than 100% greater than the price paid by Tennessee in southern Louisiana (R. 149a).

"BARNETT [Vice President in charge of gas supply of United Gas Pipe Line Company]: As far as I am concerned, yes, because that is what we have to meet if we want to buy the gas."

See also the dissenting opinion in *Transcontinental Gas Pipe Line Corp., supra*, 20 F.P.C. at 301, citing testimony that the CATCO purchase set a floor for new prices for southern Louisiana gas.

[22] *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U. S. 507, 520 (1947).

[23] *Ibid.*; *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, 610 (1944); *FPC* v. *Interstate Natural Gas Co.*, 336 U. S. 577, 581 (1949); *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, 685 (1954); *City of Detroit* v. *FPC*, 230 F. 2d 810, 817 (D.C. Cir. 1955), *cert. denied*, 352 U. S. 829 (1956).

[24] The extent of the harm to the public resulting from the ever higher initial price levels may be surmised from the fact that the FPC's staff has indicated a cost-based rate of 8.7 cents (exclusive of tax) for sales from a major southern Louisiana field where sales are now being made at 22.55 cents (exclusive of tax). *Texas Co.*, Docket G-8969, Exh. 110.

The only price "justification" was tangential; it consisted of evidence of arm's length bargaining (R. 43a) and of the desirability of the purchase from Tennessee's viewpoint (R. 41a-42a). CATCO attempted to minimize the importance of the steep initial price by asserting that prices in other contracts would not be triggered upward, but this assertion was shown on cross-examination to be of doubtful accuracy (R. 149a-159a).[25]

Twice the FPC examined this record and twice it found that there was no evidence which would support a determination that this apparently excessive price was within a reasonable range or might ultimately be found to be within a reasonable range. After the first examination the FPC found that (R. 521)

> "The record contains insufficient evidence or testimony, however, on which to base a finding that the public convenience and necessity requires the sale of these volumes of gas at the particular rate level here proposed. The importance of this issue in certificating this sale cannot easily be overemphasized. This is the largest reserve ever committed to one sale. This is the first sale from the newly developed offshore fields from which large proportions of future gas supplies will be taken. This is the highest price level at which the sale of gas to Tennessee Gas has been proposed.
>
> "Those factors make it abundantly evident that, in the public interest, this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest. See Cities Service Gas Co., Signal Oil and Gas Co., 14 F.P.C. ——, opinion No. 288, Nos. G-2569, G-2570, November 28, 1955, affirmed as Signal Oil and Gas Co. *v.* F.P.C., 238 F. 2d 771 (CA3), certiorari denied, 353 U. S. 923".

[25] Nevertheless, the CATCO Brief, pp. 4, 25, 29 flatly states there will be no triggering.

After its second examination of the same record, the FPC said (R. 528)

> "As we have already stated, the record does not contain sufficient evidence on which to base a finding that the public convenience and necessity requires the sale of the gas at the particular rate level."

On rehearing, on the identical record, the FPC ignored the factors which made "it abundantly evident that, in the public interest, this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest." Solely because Tennessee alleged that CATCO had threatened to withhold its gas, the FPC sanctioned the proposed initial rate of 21.4 cents. Its about face was excused in its third order as follows (R. 487):

> "In reaching a solution to this problem we are moved by the primary consideration that the public served through the Tennessee Gas System is greatly in need of increased supplies of natural gas. Further, it appears to us, important as is the issue of price, that as far as the public is concerned, the precise charge that is made initially is less important than the assurance of this great supply of gas. In view of these circumstances and the fact that the record does not show that the 21.4 cent rate [ex tax] is necessarily excessive, we agree with the presiding examiner that this certificate proceeding under Section 7 of the Natural Gas Act should not assume the character of a rate proceeding under Section 5(a). We are of the opinion that in the circumstances of this case, in view of the great demand for gas by customers of Tennessee Gas, the price consideration should not be made the prime determinant of what the public convenience and necessity require."

Thus, clearly revealed is a policy that price considerations are to be secondary where there is a great need for the gas,[26] at least where the proposed price is not shown to be excessive.[27]

Price was seriously in issue, as the FPC itself recognized. Its first and second orders provided safeguards against exploitation of the public until a determination of a just and reasonable price could be made. But when CATCO made it clear that it would require as the *quid pro quo* for committing its gas the abandonment of all effective safeguards and unconditional approval of the price which Tennessee, motivated solely by its own business interest had agreed to pay, the FPC capitulated and issued the order under review. In effect it made a finding therein that the public convenience and necessity require the sale regardless of the price.

When rehearing on this order was asked, the objecting parties urged the indispensability of a determination that the 21.4 cent price was required by the public interest.[28]

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[26] The record is devoid of any evidence of great need for gas and, in fact, there is no special need for the gas, let alone a great need, as we show in point 4, *infra*.

[27] This ignores the fact that the burden of proof on price is on the applicant. *Cities Service Gas Co.*, 12 P.U.R. 3d 3, 14.

[28] LILCO phrased its objection to the third order as follows:

> "The Commission as a matter of law cannot grant these producer applicants permanent certificates upon a determination based entirely on a claimed need for additional natural gas by Tennessee's customers. A proper and lawful certificate can only be granted under the Natural Gas Act on a determination based on adequate evidence that the applicants are able and willing to furnish the proposed service, the proposed sales of natural gas to Tennessee are required, *and* that the rates under which the proposed service will be rendered are in the public interest." (R. 585) (Emphasis in original)

See also the objections of Public Service (R. 595) and of the PSC (R. 539). Public Service also urged as error the finding that CATCO was willing to conform to the Act (R. 462a).

The Court below, in reversing, held that the FPC could not bind itself in a §7 proceeding to conduct a limited inquiry into just some of the elements comprising the public convenience and necessity to the exclusion of price.[29] Thus, the holding of the Court was based on precisely the issue tendered to the FPC in the requests for rehearing—*i.e.*, the indispensability of price consideration. Because the Court phrased its objection to the FPC's action in terms of jurisdiction, rather than in terms of power,[30] Tennessee and CATCO argue[31] that the Court committed reversible error in deciding, *sua sponte*, on a ground not urged before the FPC. Factually they are incorrect because the ground—indispensability of price consideration—had been urged on the FPC as fn. 28, *supra*, shows. The raising of the objection (not the precise legal conclusion) is all that is required by §19(b) of the Act.[32]

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[29] By quoting from the decision below out of context CATCO and Tennessee conclude that the Court's holding was that CATCO's refusal to accept a certificate ousted the FPC of jurisdiction to consider the matter further. CATCO Brief, pp. 11-13, 31-39; Tennessee Brief, pp. 33-36. We do not believe that a fair reading of the entire decision supports this conclusion. Accordingly we believe that the elaborate arguments CATCO and Tennessee make in support of the undeniable proposition that an applicant need not accept a certificate unsatisfactory to it and that such non-acceptance does not affect the FPC's jurisdiction are irrelevant.

[30] Actually, the Court below phrased its objection both in terms of lack of jurisdiction (R. 658) *and* lack of power (R. 662). In the context of the opinion, it seems clear that the two terms are synonymous.

[31] Tennessee Brief, pp. 19, 37-39; CATCO Brief, pp. 13-14, 43-47.

[32] Even assuming that "power" and "jurisdiction" mean different things here, and that the precise objection of the Court had not previously been urged on the FPC, there is no substance to the *sua sponte* argument, for absence of jurisdiction may be raised at any stage. The cases cited by Tennessee and CATCO actually lend support for this proposition. Thus, in *American Power & Light Co.* v. *SEC*, 141 F. 2d 606 (1st Cir. 1944), *aff'd*, 329 U. S. 90 (1946) the Court of Appeals held that since the argument that the SEC is

In sum, then, CATCO rejected the fair second order and insisted that it be allowed to charge the apparently excessive 21.4 cent price and keep any excess over a reasonable price for the period between the beginning of the service and the effective date of a rate determination. It other words, CATCO refused to sell at a reasonable rate for the period in question, a period it would have no incentive to shorten if it could continue to retain the excess during its pendency.

The FPC had no right to accede to this extortionate demand. Consider the analogy of a pipeline, or of any utility: if the utility seeking a certificate to embark on a service refuses to render the service unless it is allowed to charge more than reasonable rates, the regulatory

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not authorized (*i.e.* has no jurisdiction) under §11(b)(2) of the Holding Company Act to order dissolution of subholding companies had not been raised before the SEC, it could not be considered by the Court in reviewing the SEC's action. On appeal this Court decided that argument on the merits. 329 U. S. at 112-115. Implicit is the holding that a court may address itself to questions of jurisdiction whether they have been raised previously or not.

Such a holding is reconcilable with the §19(b) requirement. §19(b) is intended to insure that judicial review will follow only after the exhaustion of administrative remedies. *FPC* v. *Colorado Interstate Gas Co.*, 348 U. S. 492, 499-500 (1955). This Court stated (348 U. S. at 501):

> "The necessity for prior administrative consideration of an issue is apparent where, as here, its decision calls for the application of technical knowledge and experience not usually possessed by judges. The Federal Power Commission is an administrative agency the decisions of which involve those difficult problems of policy, accounting, economics and special knowledge that go into public utility rate making. For reviewing a rate made by the Federal Power Commission, the Court of Appeals has no inherent suitability, comparable to that which it has for reviewing the judicial decisions made by a United States District Court."

It is submitted that the Court of Appeals has the "inherent suitability" required to pass on a question of jurisdiction under a statute; the FPC has none. Therefore, the doctrine that administrative remedies must be exhausted (premised as it is on the proposition that the administrative agency has special knowledge and competence) is inapplicable.

commission may not accede with the excuse that the utility is stubborn and the public wants the service. The Commission at that point is required by its statutory mandate to refuse the certificate. If the public wants the service even at the expense of paying more than reasonable rates,[33] the remedy lies in changing the statute so as to permit more than reasonable rates to be charged.

That is why the Court below was correct in its analysis. The FPC had no power under this price-oriented statute to let the producers receive the excess over reasonable rates for the expectedly long period between the beginning of the service and the effective date of a rate decision.

B. The statute and its history require the FPC to exercise its powers to protect the public against excessive initial prices.

1. *Rates are the heart of natural gas regulation.*[34]

§4(a) provides

> "*All rates* and charges made, demanded, or received by *any natural-gas company* for or in connection with the * * * sale of natural gas * * * shall be just and reasonable, and *any* such rate or charge that is not just and reasonable is hereby declared to be unlawful." (Emphasis added)

The primary object of the Act is to protect consumers against excessive prices charged by natural gas companies.[35] Although it is true that the FPC has "a wide range of

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[33] *i.e.*, if the *value* of the service exceeds the just and reasonable rate.

[34] *FPC* v. *Hope Natural Gas Co.*, 320 U. S. 591, 611 (1944).

[35] *Id.*, at 610; *FPC* v. *Interstate Natural Gas Co.*, 336 U. S. 577, 581 (1949); *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, 685 (1954); *City of Detroit* v. *FPC*, 230 F. 2d 810, 817 (D.C. Cir. 1955), *cert. denied*, 352 U. S. 829 (1956).

discretionary authority in determining whether the public interest warrants certification of any particular proposed service" (*cf. Schaffer Transportation Co.* v. *United States*, 355 U. S. 83, 88 (1957)) every exercise by the FPC of its discretion in the administration of the Act must be tested against this primary purpose of the Act; if the FPC action produces a result at variance with the purpose, it is invalid. Otherwise stated, the discretion the FPC has is broad, but may not be exercised so as to defeat the purpose of the Act. Recent cases decided by this Court make this clear.

In *Schaffer Transportation Co.* v. *United States, supra*, the ICC refused to grant a certificate of public convenience and necessity to a motor carrier under Section 207(a)[36] of the Interstate Commerce Act, 49 U.S.C. §307(a). This Court reversed because the ICC's action had failed to give effect to "the sort of 'inherent advantage' that the Congressional policy requires the Commission to recognize" (355 U. S. at 91).

Mr. Justice Frankfurter, who dissented, nevertheless agreed with the principle that the administrative discretion is limited by the policy of the statute. He stated (355 U. S. at 93-94):

> "The Transportation Act of 1940 (amending the Interstate Commerce Act) grants to the Interstate

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[36] Section 207(a), which is substantially the same as §7(e) of the Natural Gas Act, provides:

> "Subject to Section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. * * *"

> Commerce Commission powers and imposes limitations upon their exercise in terms of greatly varying degrees of definiteness. As a consequence, the range of discretion left to the Commission and, correspondingly, the scope of judicial review of Commission orders greatly vary.
>
> "* * * [S]ome rules dealing with the regulation of surface transportation are narrowly specific, leaving practically no scope for discretion in their application by the Interstate Commerce Commission. Other provisions are expressed in terms which necessarily leave considerable scope in the evaluation of their implied ingredients, while still others are of such breadth as to leave even wider opportunity for an exercise of judgment by the Commission not to be displaced by a court's independent judgment under the guise of judicial review."[37]

Although the FPC undoubtedly has a wide range of discretion in certificate proceedings in determining how best to protect the public interest in not paying excessive initial rates (witness the numerous acceptable solutions devised by the FPC, described at pp. 33-35, *infra*) it may not, in the guise of the exercise of discretion, debilitate the Act's primary purpose by relegating treatment of an apparently excessive rate to a proceeding which the FPC admits is inadequate to protect the public interest (*i.e.* inadequate to effectuate the Act's policy).[38]

2. *Only at the certificate stage can the public be protected against excessive initial rates, and Congress intended such protection.*

It is undeniable that unless the FPC is required to exercise a rate function in §7 proceedings, as the sweep-

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[37] See also *American Trucking Ass'ns* v. *United States*, 355 U. S. 141, 149-150 (1957).

[38] *Cities Service Gas Co.*, 12 P.U.R. 3d at 15.

ing language of §4(a) would imply, no protection is provided by the Act against unjust initial rates. Under §4(c) of the Act every natural gas company must file its rate schedules with the FPC. §4(d) provides that "no change shall be made by any natural-gas company in any such rate" without filing the "new schedules." Under §4(e), when "any such new schedule is filed," the FPC may hold a hearing to determine the lawfulness of the new rate. Suspension and refund provisions protect the public against unjust changed rates, but §4(e) is inapplicable to an initial rate.

§5(a) permits the FPC to reduce unjust existing rates after hearings. But

> "A proceeding under §5(a) * * * is certain to entail a long delay in terms of time of final decision, and there is no way of undoing the damage done to the public in the interim period." *Cities Service Gas Co.*, 12 P.U.R. 3d 3, 15.

Commissioner Kline of the FPC has stated:

> "It is clear that until we establish criteria or standards for determining the justness and reasonableness of producer's rates, the institution by the Commission of a 5(a) proceeding is of little value.
>
> "Accordingly, the *only* practical way in which the Commission can protect the consumer against unwarranted initial prices is by the insertion of a condition in the certificate authorizing the service."[39] (Emphasis added)

Finally, there is no general reparation power in the FPC. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U. S. 246, 254 (1951).

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[39] Address delivered on September 16, 1958 at New Orleans, Louisiana, before the Independent Natural Gas Association of America convention. Copies of the speech were distributed.

Thus, unless the FPC has the duty to protect the public interest in reasonable rates in the §7 proceeding, as a practical matter a gaping hole in price protection exists.[40]

However, §7, as originally enacted in 1938, and as amended in 1942 required effective scrutiny of initial rates.[41] In 1942 the original §7(c) was stricken and the present §§7(c)-7(g) were substituted. Act of February 7, 1942, c. 49, 56 Stat. 83. Commissioner Manley of the FPC stated that the amendment:

> "* * * *will have the effect, of giving the Commission an opportunity to scrutinize* the financial set-up, the adequacy of gas reserves, the feasibility of the proposed services *and the characteristics of the rate structure at a time when such vital matters can be revised and modified as the public interest demands.* Without this authority, the Commission is too often confronted with a situation in which it must either accept conditions which appear to be undesirable from the public standpoint or take the alternative course of subsequently requiring changes which may have much more serious consequences than would have been the case if such changes had been effected before the public was invited to invest in the new enterprise." (*Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 5429*, 77th Cong., 1st Sess. 6 (1941).

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[40] See dissenting opinion of Judge Bazelon in *Oklahoma Natural Gas Co. v. FPC*, 257 F. 2d 634, 648-649 (D. C. Cir. 1958).

[41] Until 1942, §7(c) of the Act provided:

> "In passing on applications for certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." Act of June 21, 1938, c. 556, §7, 52 Stat. 824.

Commissioner Manley's construction was adopted by the House Committee in recommending enactment of the amendment. H. Rep. No. 1290, 77th Cong., 1st Sess. 2-3 (1941). See also Sen. Rep. No. 948, 77th Cong., 2d Sess. 1-2 (1942); *Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 5429*, 77th Cong., 1st Sess. 18-19 (1941); *Signal Oil & Gas Co.* v. *FPC*, 238 F. 2d 771, 774 (3rd Cir. 1956); *Oklahoma Natural Gas Co.* v. *FPC*, 257 F. 2d 634, 650 (D.C. Cir.) (dissenting opinion), *cert. granted*, 79 S. Ct. 117 (1958), *dismissed on motion of petitioners* February 20, 1959.

Since price protection to the public is at the heart of the Act; since price protection was needed in this case; since price protection could not be afforded under §§4(e) or 5(a) and was intended by Congress to be extended in certificate proceedings; it follows that the FPC committed legal error in its third order.

II

The FPC has avoided its responsibility to protect the public against excessive initial rates.

We attempt to show here that (A) the FPC has consistently and effectively safeguarded the public against excessive initial rates of pipelines, but (B) in dealing with initial rates of producers it has failed to set up a reasonable system. We then indicate (C) how the FPC could employ the field price concept to this end in the present interim period.

A. FPC treatment of initial rates—pipeline cases.

Following the intent of the 1942 amendment that rates be scrutinized at a time when revision and modification can be made in the public interest (*i.e.*, at the certificate

stage) rather than subsequently (*i.e.*, in §5(a) proceedings when complete protection can not be afforded) the FPC has uniformly required pipeline applicants to show their proposed initial rates to be just and reasonable either in the certification proceedings, or in some ancillary proceeding, but always under circumstances in which the public interest in price was protected from the outset.[41a]

Thus, when a pipeline company requests a certificate for a new sale, the FPC maintains that the pipeline has the burden of sustaining the proposed rate. This the pipeline attempts to do by presenting the best information then available on the cost of construction, expense of operation and anticipated revenues. When a pipeline applicant does not sustain this burden, the FPC, consistent with its view that an "essential ingredient" comprising the public convenience and necessity is lacking, has followed several courses. One course is simply to deny the application. *Transcontinental Gas Pipe Line Corp.*, Docket G-12059 (page 2 of order issued December 17, 1958). There the FPC stated:

> "Since the company [Transcontinental] has not sustained the rates for these services, we *must* deny the facilities for rendering them, as well as all requests for gas to have been delivered thereby." (Emphasis added)

A second course is to authorize the sale, but only if a rate condition is accepted. See, *e.g.*, *Tennessee Gas and Transmission Co.*, 4 F.P.C. 293, 305-306 (1945); *Transcontinental Gas Pipe Line Corp.*, 9 F.P.C. 32, 63 (1950); *Texas Illinois Natural Gas Pipeline Co.*, 9 F.P.C. 105, 125 (1950); *Tennessee Gas Transmission Co.*, 9 F.P.C. 271,

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[41a] See the FPC's Annual Reports to Congress: 1949 Report 114; 1950 Report 115-116; 1951 Report 109; 1952 Report 110-111; 1953 Report 112; 1954 Report 127.

294 (1950); *Erie Gas Service Co.*, 10 F.P.C. 22, 34-35 (1951); *United Gas Pipe Line Co.*, 10 F.P.C. 35, 70 (1951).

A third course is to grant a certificate, thereby permitting construction of the requested facilities, but require that an acceptable rate be filed prior to the commencement of service. See, *e.g.*, *Michigan-Wisconsin Pipe Line Co.*, 6 F.P.C. 1, 20 (1947),[42] *aff'd sub nom. Panhandle Eastern Pipe Line Co. v. FPC*, 169 F. 2d 881 (D.C. Cir.), *cert. denied*, 335 U. S. 854 (1948); *Trans-Continental Gas Pipe Line Co.*, 7 F.P.C. 24, 47 (1948); *Alabama-Tennessee Natural Gas Co.*, 7 F.P.C. 257 (1948); *Trunkline Gas Supply Co.*, 8 F.P.C. 250, 260 (1949); *Alabama-Tennessee Natural Gas Co.*, 9 F.P.C. 461, 462 (1950); *Houston Texas Gas & Oil Corp.*, 16 F.P.C. 118, 144 (1956).

Another possibility is to withhold the requested certificate pending the receipt of additional evidence. See, *e.g.*, *Kansas Pipe Line & Gas Co.*, 2 F.P.C. 29, 58 (1939).

Still another possibility is to permit the proposed rate to go into effect as an "interim" rate for a limited period, the applicant being required to agree to refund the excess over a reasonable rate as determined in supplementary hearings.[43] *Alabama-Tennessee Natural Gas Co.*, 9 F.P.C. 849 (1950).

B. FPC treatment of initial rates—producer cases.

In contrast to its firm policy on pipeline initial rates, the FPC has exhibited a marked disinclination to face the producer initial rate problem at the time when the

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[42] In *Michigan-Wisconsin, supra*, the FPC adopted this course to permit further study "to determine whether the proposed rates or some other form of rates will assure the lowest reasonable ultimate consumer charges and at the same time give to the distributing companies an incentive for the sound expansion of their gas utility business." 6 F.P.C. at 20.

[43] Such an interim rate may not be increased under the provisions of §4(d) of the Act. *Alabama-Tennessee Natural Gas Co. v. FPC*, 203 F. 2d 494, 497 (3d Cir. 1953).

§7 certificate is issued. This disinclination is based on the lengthy time anticipated in determining reasonable rates. However, if rate cases could be expected to be short, there would be less need for protecting the public during the period between the beginning of the service and the rate decision.

This creates a dilemma for the FPC. We do not say that we are indifferent to the prospect of long certificate hearings during the infancy of producer regulation; nor do we say the FPC is at fault for failing thus far to have resolved all the problems of regulating the rates of producers; nor do we say that the FPC must specifically find that a proposed initial rate is just and reasonable before a §7 certificate issues to a producer.[44]

Our position is that the FPC has the techniques to protect the public against excessive producer prices in the period during which the ground rules of regulation are being evolved and it must adopt criteria in §7 proceedings reasonably calculated to unearth those initial rates calling for the application of these techniques.[45]

The FPC purports to have found these criteria, but the history of its decisions reveals that the criteria have either been ignored or distorted when they became applicable.

1. Cities Service Gas Co.[46]

The going price in the area was 10 cents and the proposed price for the sale from Signal to Cities Service

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[44] Tennessee devotes considerable attention to the proposition that the Act does not require that a finding be made that the initial price is just and reasonable before a §7 certificate issues, Tennessee Brief, pp. 22-27. As stated above, we do not argue the contrary.

[45] Unless, of course, the producer supports the proposed rate on its merits.

[46] 12 P.U.R. 3d 3 (1955), *aff'd sub nom. Signal Oil & Gas Co. v. FPC*, 238 F. 2d 771 (3d Cir. 1956), *cert. denied*, 353 U. S. 923 (1957).

was 12 cents. Oklahoma Natural (not subject to FPC jurisdiction) and Lone Star, other purchasers in the area, showed that 10 cents was the highest price paid there and that they would have to meet any new higher prices in their future purchases. They also showed that their first party favored nations clauses[47] would then increase the prices for most of their existing purchases in the area to such new high price. There were no third-party favored nations clauses which would increase the Oklahoma Natural and Lone Star purchase prices merely because of the Signal price. The added cost to Oklahoma Natural would be about $2,000,000, and to Lone Star about $1,140,000 a year.

The FPC held that the applicant for the certificate has the burden of proving all the elements of its application, a "vital element" of which is the proposed rate, and that evidence of arm's length bargaining did not satisfy the statutory requirement of reasonableness. 12 P.U.R. 3d at 14.[48] It went on to say that in the face of admitted injury to many parties in the proceeding, a rate structure which had prevailed for some time should not be disturbed without some substantial showing that the change is necessary and that the new level is reasonable.

The injury to the public involved was not an injury to the customers of the purchasing pipeline, but rather to

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[47] These clauses provide that if the buyer purchases elsewhere in the area at a higher price, the contract price automatically escalates to that higher price.

[48] Since *Cities Service* the FPC has done a complete about face on this point. It now holds that evidence of arm's length bargaining, without more, is *prima facie* evidence of reasonableness. See, *e.g.*, *Seaboard Oil Co.*, 19 F.P.C. 416, 421 (1958). Unless an objector shows the proposed price to be unreasonable, it will be allowed. Thus the FPC justified its third order herein in view of "the fact that the record does not show that the 21.4 cent rate is necessarily excessive." (R. 487). This poses a neat problem for objectors since the FPC has also affirmed that it is impractical to permit a §7 proceeding to be converted into a rate case. See, *e.g.*, *Transcontinental Gas Pipe Line Corp.*, 20 F.P.C. 264, 271 (1958).

the customers of other companies buying in the same area. (There would not appear to be any significant difference between the adverse effect of the Signal high price on the customers of Oklahoma Natural and the adverse effect on the buyers of gas in southern Louisiana resulting from Tennessee's offshore purchase.[49] The FPC was looking at the economic impact on the consuming public generally —even on consumers buying under unregulated purchases— and the FPC insisted on holding the line when such impact was materially adverse unless the producer could prove that the contract price was reasonable.

In so doing the FPC rejected the suggestion that the public would be adequately protected if the FPC were to sanction the 12 cent price and then resort to an immediate §5(a) proceeding to test its justness and reasonableness. The FPC pointed out that a §5(a) proceeding

> "• • • *has several critical disadvantages, all detrimental to the public interest.* • • •
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> • • • • • •
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> "A proceeding under §5(a), moreover, is certain to entail a long delay in terms of time of final decision, and there is no way of undoing the damage done to the public in the interim period. A proceeding under §5(a) is, itself, more time consuming than the course of action we employ here, thus, *administratively more difficult and would confront us with a multiplicity of actions, all brought on by our failure to act in the first instance.*". 12 P.U.R. 3d at 15. (Emphasis added)

The FPC's decision was affirmed on appeal, 238 F. 2d 771, the Court holding that the granting of a temporary

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[49] The CATCO purchase set a floor for new prices for southern Louisiana gas. See *Transcontinental Gas Pipe Line Corp.*, 20 F.P.C. 264, 301 (1958).

certificate[50] did not deprive the FPC of power to impose a rate condition in the final certificate; that the FPC had the same power to condition producer certificates as pipeline certificates; and that there was substantial evidence to support the 10 cent condition.

The Court therefore upheld the rate condition in the absence of justification by the producer of the reasonableness of the 12 cent price and in the absence of any claim that 10 cents was confiscatory.[51]

2. Anthony J. Tamborello[52]

This case was decided the same day as *Signal*, and it involved a proposed 16 cent price (excluding tax) for gas sales in Louisiana to Transcontinental Gas Pipe Line Corporation.[53] The FPC stated that its policy was (11 P.U.R. 3d at 416)

> "• • • to reach agreement on the various rate problems arising in connection with certificate applications prior to or during the hearings on such applications. When this cannot be done, *it is necessary to condition the certificates issued in such proceedings*, to require the filing of proper rates some time in the future."

Having thus reaffirmed its policy, the FPC then abandoned it (*Id.*, at 417):

> "• • • because the economic and other conditions presented in certificate applications filed by inde-

[50] Signal had been serving under a temporary certificate. The rate condition was therefore entered at a time when Signal could not abandon the service without permission. The treatment we urge for producers (*e.g.*, the second CATCO order), would enable them to avoid being thus ensnared.

[51] Significantly, CATCO never has claimed that the 17 cent lower limit set by the second order is confiscatory. The absence of such claim is some support for the inference that the 17 cent price would not have been unjust.

[52] 11 P.U.R. 3d 413 (1955).

[53] Hereinafter called "Transco."

> pendent producers are substantially different from those presented in certificate applications filed by interstate pipeline companies, the commission has not deemed it prudent to expend the time required to resolve rate issues at this stage, nor has it found it practical to inquire into the reasonableness of producer rates in all producer certificate proceedings."

The differences between producers and pipelines calling for laxer treatment of producer prices are not spelled out. However, the FPC hastened to add that it is (*Ibid.*)

> "• • • necessary for the commission to have before it in deciding a producer certificate application the basic facts[54] as to the rates to be charged. If on the basis of such evidence it appears to the commission that examination into the justness and reasonableness of a specific rate of an independent producer in a certificate proceeding is required, there is ample authority in the statute for appropriate inquiry to be made in that proceeding."

Since the rate effect on the pipeline purchaser, Transco, was found to be "negligible, slightly in excess of one per cent, *ibid.*, no such examination was held warranted. Thus, the effect of the price on the buying pipeline was emphasized, rather than on other pipelines, as in *Signal*. In any event, the *Tamborello* standard has also been abandoned. In CATCO, the buyer's purchased gas costs increased about 1 cent (R. 45a), or 8%, and in *Transcontinental Gas Pipe Line Corp. (Texaco-Seaboard)*, 20 F.P.C. 264, they were increased by more than 2 cents. Yet the FPC felt that neither case merited a rate condition.

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[54] What "the basic facts" encompass is not detailed.

3. Natural Gas Pipeline Co. of America[55]

The salient factor in this case was the large unsatisfied demand for gas in the Chicago area. Evidence had been introduced showing 260,000 house heating customers awaiting service. Nevertheless, the hearing examiner concluded that the economic disruption which the proposed price (the amount of which was in disagreement) would cause "would be substantially greater" than that envisaged in the *Cities Service* case and that the producers had "failed to show that the public convenience and necessity" required the certificates to issue on the "terms urged by them.[56] He therefore conditioned the certificate on acceptance of an 11 cent price.

The producers advised the FPC that they would not sell their gas at the 11 cent price and the FPC obligingly reversed its hearing examiner and eliminated the price condition from the certificate. It stated that in *Signal* it had made clear "that the particular circumstances presented in each case are of decisive importance in determining whether" a price condition should be imposed. 16

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[55] 16 F.P.C. 80 (1956), *rehearing denied*, 17 F.P.C. 85 (1957), *aff'd sub nom. Oklahoma Natural Gas Co.* v. *FPC*, 257 F. 2d 634 (D. C. Cir.) (2 to 1), *cert. granted*, 79 S. Ct. 117 (1958), *dismissed* February 20, 1959 on motion by the petitioner which stated that the cause had become moot since it had already had to pay an even higher price in the area than the price level it had been contesting in the proceedings. The motion pointed out that the petition for the writ of certiorari "was predicated upon there being a substantial question as to the reasonableness of the rates proposed to be paid for natural gas, arising principally from the fact that the rates proposed were substantially in excess of the prevailing rate in the area which resulted in serious detriment to the petitioner * * *." In other words, Oklahoma Natural could no longer obtain relief, as it was too late.

[56] These conclusions are set forth at R. 342 and 344 in the record filed in this Court on the petition of Oklahoma Natural for review of the 2 to 1 decision of the Court of Appeals upholding the unconditional grant of a certificate. No. 288, October Term, 1958.

F.P.C. at 91-92. It continued that (*Id.*, at 92)

> "• • • these circumstances include the extent to which a convincing showing has been made that as a result of the price proposed, the prices for other sales in the area in question will be increased, keeping in mind such relevant factors as the kind and quantity of gas sold, the degree of competition present in the area, and the extent to which the producer contract in question resembles the other gas sales contracts in the area.[57] But in this case, no convincing showing has been made that as a result of the price proposed under the contract between Natural and the producers, the results we envisaged in • • • [*Cities Service*] will come about. Nor are we satisfied that the competitive conditions in the Jack and Wise Counties area are such as to justify fixing upon 11 cents as the prevailing price."

On rehearing, the FPC stated that price is only one factor to be considered and that other elements overbalanced price (17 F.P.C. at 88).

On appeal the FPC decision was affirmed. The majority decided the case on the premise that the new price was not out of line with prevailing prices (257 F. 2d at 638). In combination with the finding of enormous need for additional gas in Chicago,[58] the majority concluded to treat this as a case like *Florida Economic Advisory Council* v. *FPC*, 251 F. 2d 643 (D. C. Cir. 1957), *cert. denied*, 356 U. S. 959 (1958), where the issue was whether every

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[57] An attempt was unsuccessfully made in CATCO to introduce in evidence contracts for the purchase by Tennessee of offshore gas from the West Delta area of Texas at a price of 17 cents, which are materially identical to the CATCO contracts (R. 185a), for the purpose of testing the CATCO price (R. 193a-194a).

[58] The instant case is distinguishable, at least to the extent that here there is no evidence of need.

certificate had to be preceded by a finding as to whether the rate is just and reasonable.[59]

In contrast Judge Bazelon's dissent went behind the FPC's decision and found in the record that the price of 13.9 cents really represented a cost of gathered gas of between 15.3 cents and 17.55 cents. He compared this with the concession on the record that the highest price paid in Jack and Wise Counties was 11 cents and concluded that the *Signal* doctrine was fully applicable since §§4 and 5(a) do not protect consumers against excessive initial rates for the reasons pointed out by the FPC in *Signal*. He stated that (257 F. 2d at 651-652)

> "While parity with field price may not alone be sufficient for a determination of justness and reasonableness of a rate * * *[60] substantial disparity with field price is a sufficiently reliable index of unjustness and unreasonableness of a rate to preclude certification without a rate determination."

Judge Bazelon reasoned that (257 F. 2d at 652-653)

> "* * * however difficult the administrative problem may be, the Commission *must* review and analyze the producers' rate as a vital element of the determination of whether the proposed extension project is required by the public convenience and

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[59] In the *Florida* case, no contention was made that the initial rate was so high as to be unreasonable. The complaint there, made by persons dealing in competitive fuels, was that the price was too low. See 251 F. 2d at 647.

[60] Judge Bazelon cites *City of Detroit* v. *FPC*, 230 F. 2d 810 (D. C. Cir. 1955), *cert. denied*, 352 U. S. 829 (1956); *Bel Oil Corp.* v. *FPC*, 255 F. 2d 548 (5th Cir.), *cert. denied*, 79 S. Ct. 46 (1958); *Pan American Petroleum Corp.*, 19 F.P.C. 463 (1958). In *Pan American* the two commissioners (Stueck and Kline) joining in the main opinion state (19 F.P.C. at 474)

> "* * * while we are not permitted to use field prices alone in determining whether a price is just and reasonable after it has been suspended by us, no such standard is required of us in determining whether or not we should suspend in the first instance."

necessity. And if, on the basis of analysis there appears a substantial question as to the lawfulness of the proposed rate, it may not certify the project as required by the public convenience and necessity unless it resolves that question. It is, of course, within the Commission's discretion to postpone for a rate proceeding the complicated task of determining the justness and reasonableness of the proposed rate, by conditioning its certificate upon the filing of a lower rate. That course was followed in Cities Service and, with respect to rates other than producer rates, in many other cases [citing the FPC's 1953 Annual Report 112 and 1954 Annual Report 128]."

The above quote is the core of our argument.

4. Seaboard Oil Co.[61]

In this case a sale of Louisiana gas at the proposed price of 19.5 cents was authorized over the claim that an 18 cent condition should have been imposed. The majority opinion (Commissioners Digby and Kline) stated that "high initial prices appearing in some contracts filed with us are a matter of grave concern to us," 19 F.P.C. at 424, but nevertheless it chided those who had raised the initial price issue. 19 F.P.C. at 422.

Three conditions precedent were set forth which the FPC stated would have to be met to warrant a *Signal* type treatment: (1) Would the proposed price affect the price to be paid by customers of the pipeline buyer? (19 F.P.C. at 419) (2) Would it result in other pipelines paying higher prices for gas purchased in the area? (19 F.P.C. at 419) (3) Would it set a new high in any area? (19 F.P.C. at 424). Since the majority was able to find a negative answer to each question it concluded that special scrutiny of the proposed rate was unwarranted.

[61] 19 F.P.C. 416 (1958).

Chairman Kuykendall, concurring, felt that *Signal* could not be reconciled with the *City of Detroit* case[62] and he felt that *Mobile*[63] restricted the *power* of the FPC to impose rate conditions.

Commissioner Stueck also concurred in the result, but disagreed in some unstated ways.

Commissioner Connole dissented. He claimed the conditions precedent were "unrealistically restrictive", citing the fact that except for *Signal*, the FPC had approved unconditionally every initial rate of the hundreds presented to it by producers (19 F.P.C. at 436). He demonstrated the invalidity of the majority's standard (19 F.P.C. at 434):

> "Suppose the proposed price was twice that actually proposed, that is, 39¢ instead of 19.5¢. Despite this absurd figure majority's standards still would offer no basis for denying or conditioning the authority sought. Here is why it would not.
>
> "First, if we substitute 39¢ and the prevailing price of 17¢ in the calculation used by a majority on page 419, the effect on United's cost of gas would still be a *de minimis* seventy-three hundredths mill per MCF. Secondly, as majority points out, the price would 'trigger-off' no favored nations clauses in United's contracts because United's contracts have none, and there is nothing in the record whether it would affect any other prices in the area.
>
> "Thirdly, since there would be no specific measurable result on the general price structure and since

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[62] 230 F. 2d 810, holding that field price data alone was insufficient to support a rate increase under §4.

[63] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332 (1956). *Mobile* does not so tie the FPC's hands. There the Court held that the initiative for entering into contracts rests with buyer and seller, producer and pipeline or pipeline and distributor. But this does not mean that when a company seeks to operate as a natural gas company and submits a rate schedule, the FPC may not reject the schedule entirely or impose a condition as specifically provided in §7.

> majority have rejected the axiom that high prices, *per se*, inevitably affect the entire demand-supply structure there is no basis for questioning the price level even if it sets a new high.
>
> "I conclude, therefore, that under majority's standards there would be no support in this record for a denial of an application of the issuance of a conditioned certificate for the sale of gas at 39¢."

Part of the majority standard for determining whether a price condition would be imposed was whether the price represented a new area high; Commissioner Connole advocated, instead, examination of the pattern of prices in the area to determine whether the new price is in line with the field price, the going price (19 F.P.C. at 428):

> "The point is that if a price which will affect the customers of one pipeline or result in general price increases in the area is good cause to impose a pricing condition, then certainly potential danger to an entire demand-supply structure is better cause. And steadily rising prices, unchecked by economic forces and unimpeded by regulatory action, inevitably will cause such damage. * * * Obviously, any price higher than the generally prevailing prices in an area will tend to raise the prevailing price whether it 'pierces the ceiling' or not. This is simple arithmetic. The straw that caused the collapse of the proverbial camel was hardly distinguishable from the rest after the whole pile tumbled. Certainly the total effect on the price structure is no less important to us that the effect of one part of it."

5. Hope Natural Gas Co.[64]

This proceeding involved the sale of gas in West Virginia. The applications for certificates were unopposed, and the FPC, granting the certificates, stated the criteria applicants were required to meet (19 F.P.C. at 407):

[64] 19 F.P.C. 405 (1958).

"• • • if the applicant proves there is a market for the gas at the proposed price[65] and that the project is economically feasible[66] at the proposed price (both market and economic feasibility being factors which we consider in determining public convenience and necessity) that it has sustained its burden of going forward with the evidence, and in the absence of evidence showing that the proposed price or rate adversely affect the public convenience and necessity, the applicant has made out a prima facie case, and a certificate should issue to it."

The FPC found support for this view in *Florida Economic Advisory Council* v. *FPC*, 251 F. 2d 643, *cert. denied*, 356 U. S. 959 and *Panhandle Eastern Pipe Line Co.* v. *FPC*, 169 F. 2d 881, *cert. denied*, 335 U. S. 854, both of which are readily distinguishable. In *Florida* there was no claim that the proposed rate was "either unreasonably or in any other respect unlawful." See 251 F. 2d at 647. The certificate was attacked by competing fuel interests whose interest lay in showing the rate was too low.

In *Panhandle* which was not a producer case, but instead involved pipeline rates, the FPC granted a certificate conditioned upon the subsequent filing of a schedule by the pipeline of reasonable rates consistent with the public interest, which filing was to be made before the start of operations.

Panhandle is entirely consistent with the view we take. That is, the FPC need not make a rate case out of a §7 proceeding, but it must apply some technique to prevent the public from being harmed by an unreasonable rate until a reasonable rate can be determined. In *Panhandle*,

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[65] This means nothing more than that a willing pipeline buyer has been found.

[66] Economic feasibility has not been further described.

this finding of a reasonable rate was deferred until after construction was completed, but *prior* to the commencement of service.

Chairman Kuykendall concurred in the result, referring to his *Seaboard* opinion. Commissioner Connole dissented. He said the FPC's records show the 27 cent price was 7.8 cents higher than prevailing producer prices in the county except for one 25 cent contract under which there was no record of sales.

6. Superior Oil Co.[67]

Six weeks after *Seaboard* the FPC scrapped the "new high" test. The price in *Superior* was 21.3 cents; it was higher than any price appearing in a gas rate schedule for the pricing area which was effective and not subject to §4 or §5(a) proceedings. The staff of the FPC presented an exhibit showing eight prices in the area were as high as 21 cents, but §5(a) proceedings were pending as to seven of them and expected for the eighth. A 19.5 cent contract was subject to a §5(a) proceeding; three out of four at 19 cents covered very small reserves, leaving only one contract higher than 18 cents. The staff recommended an 18 cent price condition. (19 F.P.C. at 645-646).

The majority issued an unconditional certificate *on the basis of Seaboard.* Chairman Kuykendall and Commissioner Stueck concurred on the basis of their *Seaboard* opinions.

Commissioner Connole dissented. He cited testimony that the highest price paid by any pipeline in the area must be met by other purchasers, commenting (19 F.P.C. at 639):

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[67] 19 F.P.C. 637 (1958).

"This exchange states the case for considering price in producer certificate applications more clearly and more effectively than all the statistics in our file cabinets. Plainly, the gas purchasing segment of the natural gas industry is running in a treadmill. And each turn of the wheel brings into view another and higher price that must be met if the buyer is only to stand still. And little hope appears that the crazy race against itself will be won unassisted."

7. Transcontinental Gas Pipe Line Corp. (Texaco-Seaboard)[68]

This sale involves 2 billion mcf to be produced in southern Louisiana and offshore. The price ranges from 22.4 to 23.3 cents. Commissioner Connole, dissenting, demonstrated that the *Seaboard* tests were met: Transco's customers had already been obliged to agree to pay an extra 2 cents per mcf as a result of the Texaco-Seaboard purchase subject to their right to contest the increase before the FPC; and Transco was exposed to favored nations increases amounting to $5 million per year; and a new high was set (20 F.P.C. at 299-300).

Nevertheless, Commissioner Hussey refused a price condition and Chairman Kuykendall concurred, again on the basis of his *Seaboard* opinion. Commissioners Stueck and Kline did not vote.

The effect of the triggering is discounted in the majority opinion (20 F.P.C. at 274):

"The fact is, however, that before any such 'triggered' increases could be passed along, filings for increased rates would have to be made by the producers and these would be subject to our scrutiny and control under the rate suspension provisions of Section 4 of the Act."

[68] 20 F.P.C. 264 (1958), *appeal pending sub nom. United Gas Improvement Co. v. FPC* (3d Cir. No. 12797).

Precisely the same was true in *Signal* in the case of the purchases by Lone Star (see p. 37, *supra*) yet in *Signal* the triggering was emphasized in support of the price condition.

C. The relevance and use of field prices

It has been settled that field prices standing alone are inadequate to fix just and reasonable rates for independent producers.[69] Nevertheless, the FPC uses field prices as a yardstick in determining whether to suspend increased rates under §4. *Pan American Petroleum Corp.*, 19 F.P.C. 463, 474; and field prices are also used as of some probative value in determining just and reasonable rates. *Ibid.* The field price concept, as used in this context, is not a simple arithmetic average of all prices charged in the field, or a weighted average, nor is it the highest prices charged in the area. The field price concept is more flexible. Some consideration is given to all prices, but their relative significance will be weighed in light of such qualifying circumstances as the volumes involved, the dates of the contracts, whether the rates provided in the contracts are under examination in Commission proceedings under §4 or §5(a) of the Act, the richness of the gas, etc.

The underlying hypothesis is that in the absence of cost data, a general survey of many prices which are not themselves under attack will indicate a kind of consensus which may permit tentative inferences as to reasonable rates. This hypothesis may be attacked, and it certainly is of decreasing soundness as more experience is gained in regulating produce rates, but as a temporary yardstick there is much to support the FPC's view that field prices

[69] *City of Detroit* v. *FPC*, 230 F. 2d 810 (D. C. Cir. 1955), *cert. denied*, 352 U. S. 829 (1956); *Bel Oil Corp.* v. *FPC*, 255 F. 2d 548 (5th Cir.), *cert. denied*, 79 S. Ct. 46 (1958).

should be used for the two purposes mentioned above. There is, of course, no justification whatever for using maximum price in an area rather than field prices.

It would seem sensible to use field prices for the further purpose of determining when an initial rate should be gone into.

When the purpose of this criterion relates to the situation of a particular seller in comparison with the many prices which other buyers and sellers have reached, the FPC should not be much interested in merely the highest price reached by others; the FPC should be interested in all prices reached by others over a reasonable period of time.

Thus Commissioner Connole is correct when he says that this criterion should be applied by seeking the price at which a typical new sale of gas would take place,[70] and he and the staff of the FPC are correct in maintaining[71] that prices which are being investigated under §5(a) or which are being collected under bond in §4 proceedings should be given little or no weight.

The FPC has perverted this standard by merely asking for the highest price which others have paid. That standard could not reasonably be used either as a basis for determining when to suspend an increase under §4 or as of any evidentiary value whatever in determining just and reasonable rates. The recurring objection of the majority that field prices lack evidentiary value because of the failure of those proposing field prices as a standard to show their comparability (see, *e.g.*, *Transcontinental Gas Pipe Line Corp.*, 20 F.P.C. 264, 272) lacks substance

[70] See Connole, *Threshold Prices: A Practical Proposal for Producer Pricing*, 63 Pub. Util. Fort. 23, 35 (1959). See also the dissenting opinions of Commissioner Connole in *Seaboard Oil Co.*, 19 F.P.C. 416, 432 (1958) and *Transcontinental Gas Pipe Line Corp.*, 20 F.P.C. 264, 294, 301-302 (1958).

[71] *Superior Oil Co.*, 19 F.P.C. 637, 645-646 (1958).

because when field prices are used by the FPC for other rate-making purposes, they are subject to the same theoretical defect (*Id.*, at 294-295). Furthermore the FPC has a responsibility to have the facts fully developed. *Cf. Isbrandtsen Co.* v. *United States*, 96 F. Supp. 833, 892 (S.D.N.Y. 1951), *aff'd*, 342 U. S. 950 (1952).

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We have attempted to show that since *Signal* the FPC has totally failed to regulate initial rates of producers. Indeed, it has requested Congress to relieve it of any obligation in this area.[72] If Congress complies, it will merely eliminate what the FPC has converted into a useless formality, because, as history shows, the FPC has set standards for regulation, only to ignore them. In effect the FPC has become a disinterested observer of the natural gas price spiral, its protestations of concern to the contrary not withstanding. It has taken refuge in the notion that somehow the public's interest in just prices will eventually be vindicated when forces of supply and demand balance. But any remedy achieved in the area of natural gas regulation through the operation of supply and demand is a nostrum, for price regulation in an area proceeds from the axiom that the public interest in just prices in that area is not protected by the free interplay of economic forces.

In sum, CATCO is merely symptomatic of the FPC's abhorrence of becoming what it describes as a "peacetime OPA", see 20 F.P.C. at 273, and its unwillingness to interfere with supply and demand factors. The reversal by the Court below of the FPC's CATCO decision has been ignored by the FPC in *Texaco-Seaboard*. *Signal* is

[72] Its 1958 Annual Report asked "That the pertinent sections of the Natural Gas Act be amended to provide for (1) elimination of any requirement for certificates of public convenience and necessity for producers of natural gas" (p. 15).

limited to its facts. We submit that even apart from the compelling facts in CATCO, the Court should affirm for the reason that although the FPC has a wide range of discretion in determining how to safeguard the public interest in reasonable initial prices, its exercise of that discretion is limited to procedures reasonably designed to accomplish that end (see pp. 28-30, *supra*), which it has not yet done. We urge that at this stage of the FPC's regulation of producer rates, comparison with going field prices, and consideration of such related matters as the volumes involved, the effect on the buying pipeline, and possibilities of escalation, would be an adequate test of the reasonableness of a proposed initial rate. The CATCO price would not survive it, whatever the need for the gas.

III

The argument that administrative convenience requires deferring initial rate considerations to §5(a) proceedings is baseless.

As Commissioner Connole has noted:

> "Investigation of proposed sales to determine whether the public convenience and necessity requires them at proposed prices has not been tried and found difficult, to paraphrase Chesterson [sic]. Rather it has been found difficult and not tried." *Seaboard Oil Co.*, 19 F.P.C. 416, 432.

The FPC's convenience would actually be served by applying a *Signal*-type solution, for (*Id.*, at 435):

> "If the proposed price is within the range of going prices obviously there will be no need of any hearing, protracted or otherwise. And proof that it is within the going price range easily can be filed with the application and verified from the annual reports filed by producers with the Commission. In such a case obviously there would be no delay at all. On

> the other hand, if an applicant believes it can support a price higher than the going price in the area, there are two alternatives open to it which would enable it to render service promptly. Both have been used by us. See the *CATCO* case, G-11024, *et al.* It may file for and obtain a certificate on a price level within the going range and promptly file for an increase in rates upon the issuance of the certificate. The requisite contractual agreement of the purchaser to such a procedure should be no more difficult whether the certificate has issued or not. As a second alternative, applicant could accept temporary authority at a going price and attempt to justify a higher price at the subsequent hearing. Only if an applicant seeks to obtain a certificate at a price higher than what might be termed the going price in the area and only if it refuses to avail itself of the procedures open to it for initiating production and sales will any delay ensue at all. But such a refusal on the part of the producer obviously would be the producer's fault and not the Commission's."

Moreover, no greater administrative burden would be imposed on the FPC if the second CATCO order, for example, had been adhered to than exists under the inadequate solution offered by the FPC of deferring price considerations to §5(a) proceedings.

The third order in CATCO relegated the inquiry into the 21.4 cent price to a §5(a) proceeding. It is submitted that the second order in CATCO setting an initial price of 17 cents and permitting immediate escalation to 21.4 cents posed no greater burden. Whether the rate investigation is to occur in a §4 proceeding, as envisaged by the second CATCO order, or in a §5(a) proceeding, called for by the third CATCO order, the FPC would be required to supply a hearing examiner, staff counsel and experts, and space. It is difficult to see how the hearing envisaged

by the second CATCO order would be any more time-consuming than the hearing suggested by the third CATCO order. Furthermore, the onus on the FPC may be greater in a §5(a) proceeding since it may have the burden of showing excessiveness.[73] In proceedings under other sections of the Act, the burden of showing the reasonableness of a rate is on its proponent.

Moreover, if the reasonableness of the initial rate is decided in a §5(a) proceeding, the producer has no incentive to expedite the case; the longer it goes on, the longer the producer will be allowed to collect *and keep* any amount by which the rate is found excessive. But if the question is decided in a §4 case, or through one of the other procedures we have mentioned, the producer will not be subjected to the temptation to dally. Thus, the administrative burden in a §5(a) case is considerably greater. All these matters considered, it is difficult to see how administrative convenience provides any reason for preferring a §5(a) proceeding.

In the *Cities Service* case, the FPC took the position that relegating consideration of the reasonableness of proposed initial rates to §5(a) proceedings would be "administratively more difficult and would confront us with a multiplicity of actions, all brought on by our failure to act in the first instance." 12 P.U.R. 3d at 15. Now, precisely the reverse is argued.

Nor would the course we advocate result in an end to the abridged hearing procedure provided by the FPC's

[73] If, as in the pending §5(a) proceedings involving the CATCO companies, the FPC staff declines to accept this burden (see fn. 15, p. 12, *supra*), other parties will be required to develop the pertinent facts which are within the knowledge of the producers. For this purpose, resort must be had to extensive discovery procedures which would prolong matters even if the FPC cooperates fully. But see *Union Oil & Gas Corp. of Louisiana*, 17 F.P.C. 544 (1957) which indicates a highly restrictive FPC policy toward discovery procedures.

rules. 18 C.F.R. Section 1.32(b). In the case of the majority of producer certificate applications where the price proposed is not out of line there would be no need for lengthy hearings and no need for extensive findings.

IV

The Record is Devoid of Any Evidence of Need. No Valid Finding Could be Made that a Need for the CATCO Gas Existed, Therefore, and Absence of Price Justification Could Not be Excused on the Basis of Need.

Petitioners support the third order, and the FPC's decision to certificate the CATCO sale without requiring support for the proposed price, because the gas involved was "urgently needed."[74] This conclusion could not stem from anything in the record, since the only record reference even remotely relating to need came in response to a question as to why Tennessee had entered into the CATCO contracts. The response was

> "• • • to obtain gas reserves to supply the expansion of Tennessee's markets, as is shown in Tennessee's pending application in Docket G-11107." (R. 41a).

This testimony was given on February 28, 1957. Hearings had not yet begun on Tennessee's application in G-11107,[75] nor were they to begin until May 14, 1957, which was six days prior to the second order in CATCO. No final order

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[74] Tennessee Brief, p. 13. The CATCO Brief, p. 17, describes the demand for gas as "great".

[75] This is the proceeding in which Tennessee was asking permission to construct facilities to sell 249,000 mcf of gas per day to its existing distribution company customers.

was entered in G-11107 until January 28, 1959, *subsequent to the Court of Appeals decision herein,* and some eighteen months after the third CATCO order which presciently and conveniently divined a great need for the CATCO gas.

Even ignoring the sequence of events, and assuming that the FPC in June of 1957 could foresee that in January of 1959 it would authorize the Tennessee expansion, it was not entitled to consider that fact in determining that a great need for the CATCO gas existed. Due process of law requires that the facts which are considered by the tribunal must be disclosed at the hearing and made part of the record. *Ohio Bell Telephone Co.* v. *Public Utilities Comm'n,* 301 U. S. 292 (1937). The tribunal may not afford recognition to facts not disclosed at the hearing by official notice. *Ibid.,* 300-302. Even passing these considerations, the conclusion of need must be supported by findings of the essential facts. *In re United Corp.,* 249 F. 2d 168, 179-180 (3d Cir. 1957), and cases cited. Such findings are absent because the record lacks *any* facts on the subject.

The FPC also knew of an application made by Tennessee late in 1955 for authority to extend its marketing area to the middle west through a subsidiary, Midwestern Gas Transmission Company, Dockets G-9451 and 9453, and to serve 200,000 mcf per day in the area. This proposal is still pending; it has been hotly contested.[76] But we may assume that Tennessee will eventually be successful. Even so, there is more than reasonable doubt that facts could be adduced to support any finding of great need by Tennessee which would warrant the FPC's wholly ignoring the question of price. In 1958 Tennessee was able to represent in support of a prospective sale of securities that

[76] See *Midwestern Gas Transmission Co.* v. *FPC,* 258 F. 2d 660 (D.C. Cir. 1958) for a description of some of the proceedings.

> "the estimated reserves under all contracts are equal to approximately twenty times the estimated annual input requirements of the presently authorized and proposed facilities. * * *"[77]

Since the CATCO gas makes up 11 or 12% of Tennessee's total reserves (R. 139a-140a), this means that without the CATCO gas Tennessee has about an eighteen year reserve, including its new service requirements authorized in G-11107 and assuming that it is ultimately authorized to serve the midwestern market. An eighteen year supply is quite in line with the number of years' supply available to the other major pipelines in the United States, and exceeds some of them.[78] Thus even if the FPC were able to do what *Ohio Bell, supra,* says it may not do, it is difficult to find any need, let alone urgent or great need.

The wisdom of the *Ohio Bell* holding is apparent in this case. The FPC justifies its action on the basis of a finding shaped out of thin air; no opportunity ever existed to cross examine on the question of need or to introduce evidence showing the absence of need because no attempt was made to prove need. Elementary fairness thus requires the *Ohio Bell* holding.

Even if we assume the existence of a need for the gas, would this then justify discretionary abandonment of the price issue? An affirmative answer necessarily means that price considerations may be subordinated to need, if not

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[77] This is a portion of a report made by Ralph E. Davis, a geologist, who had made a recent study of Tennessee's natural gas reserves. The report was set forth on p. 17 in the registration statement filed by Tennessee with the Securities and Exchange Commission on February 26, 1958. (File 2-13923).

[78] El Paso Natural Gas Company, one of the bidders for the CATCO gas, has substantially smaller reserves. *El Paso Natural Gas Co.*, Dockets G-12580 and 13862 (pp. 6-11 of mimeo. op. dated February 26, 1959).

to other considerations. However, the Act's primary policy is to protect consumers against excessive gas prices. As shown above, it is settled that any discretion exercised by the FPC must be in furtherance of that policy. *Schaffer Transportation Co.* v. *United States*, 355 U. S. 83, 88 (1957); *American Trucking Ass'ns* v. *United States*, 355 U. S. 141, 149-150 (1957). It may be that in a proper case some exceptional circumstance could justify a discretionary subordination of price, even in the face of the policy of the Act. For example, an imminent curtailment of service to existing customers would make understandable the FPC's sanctioning a purchase at whatever price the seller could exact if the gas were otherwise unobtainable. Since the FPC has no power to compel a natural gas company to extend its service, see *Panhandle Eastern Pipe Line Co.* v. *FPC*, 204 F. 2d 675 (3d Cir. 1953), it could very well, in the emergency, fall back on §5(a) proceedings in partial protection of the public interest in price.[79]

Of course, we have no such exceptional circumstance in the instant case. We have here merely a pipeline's desire to take on new business.

Apart from the absence of facts of record to show that Tennessee's midwestern expansion plan was preferable to those of other pipelines, the FPC had and has nothing before it to enable it to find that the detrimental effects to existing customers of an expansion outweigh the advantages reasonably to be anticipated by new customers. Under present FPC regulatory policy, existing customers

[79] It is interesting to note that in a wartime emergency with essential production already having suffered periodic interruptions and with residential usage threatened because of a "severe shortage of natural gas", the FPC still insisted on following the statutory command. It granted a certificate permitting the construction of facilities needed for a proposed sale of gas which would have alleviated the shortage, but required acceptance of a price condition nevertheless. See *Tennessee Gas & Transmission Co.*, 4 F.P.C. 293, 301, 306 (1945).

are required to pay higher rates whenever a pipeline acquires high priced gas to serve new customers because the cost of the high priced gas is "rolled in" to the pipeline's cost of service, and this cost of service is borne by all of its customers. The advantage to the new group may be measured by comparison of the cost of the gas to it with the cost of competing fuels. The detriment to the existing customers may be measured by the increased cost to them occasioned by rolling in the new high priced gas. These measures would afford some basis for rational examination of where the public interest lies, *even assuming the price for the new gas is reasonable or is not to be questioned.* But no such measures were taken.

Thus, when the FPC said there was a need for the gas, it was equating Tennessee's desire for additional gas for expansion purposes with need. When it said that the need for the gas justified throwing price considerations out the window, it was inevitably saying that price considerations almost always go out the window because practically every certificate case reflects a pipeline's desire to have additional gas so that it may take on new business. This is not a *reductio ad absurdum;* the absurdity is present in this very case. With usage of natural gas expanding, the FPC's type of "need" will always exist; at precisely the time when the purpose of the Act to protect consumers against unjust prices requires implementation, the FPC in its discretion waives that purpose.

We urge that the price protective provisions of the Act may be ignored, if at all, in only the most compelling circumstances; that no compelling circumstance of need has been or could be shown here; and that if the FPC's interpretation of need is valid, the public interest in price is emasculated and there may be no purpose in continuing producers' §7 proceedings.

Conclusion

We have endeavored to show that the Act requires effective treatment of initial rates by the FPC, but that the FPC has been content to avoid this duty in producer regulation for the most part. When, as here, the need for applying the Act in full vigor was apparent, the FPC abdicated its responsibility.

For the foregoing reasons it is respectively submitted that the FPC's third order was erroneous and was properly reversed by the Court below.

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April 8, 1959.

APPENDIX

e pertinent provisions of the Natural Gas Act of
21, 1938, c. 556, 52 Stat. 821, as amended by Act
bruary 7, 1942, c. 49, 56 Stat. 83; 15 U.S.C. §§717-
are as follows:

TION 4. (a) All rates and charges made, demanded,
ceived by any natural-gas company for or in connec-
with the transportation or sale of natural gas sub-
o the jurisdiction of the Commission, and all rules
egulations affecting or pertaining to such rates or
es, shall be just and reasonable, and any such rate
arge that is not just and reasonable is hereby declared
unlawful.

• • • • • •

Unless the Commission otherwise orders, no change
be made by any natural-gas company in any such
charge, classification, or service, or in any rule,
ations, or contract relating thereto, except after
days' notice to the Commission and to the public.
notice shall be giving by filing with the Commission
keeping open for public inspection new schedules
g plainly the change or changes to be made in the
ule or schedules then in force and the time when the
e or changes will go into effect. The Commission,
ood cause shown, may allow changes to take effect
ut requiring the thirty days' notice herein provided
y an order specifying the changes so to be made
he time when they shall take effect and the manner
ich they shall be filed and published.

Whenever any such new schedule is filed the Com-
n shall have authority, either upon complaint of
State, municipality, or State commission, or upon

its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision

found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

* * * * * * *

SECTION 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural-gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural-gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * * * *

SECTION 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct

a natural-gas company to extend or improve its transportation facilities, to establish physical connection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

* * * * * * *

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transporation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate with-

out requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

* * * * * * *

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation,

construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

* * * * * * *

Nos. 518 and 536

In the Supreme Court of the United States

OCTOBER TERM, 1958

THE ATLANTIC REFINING COMPANY, CITIES SERVICE PRODUCTION COMPANY, CONTINENTAL OIL COMPANY, TIDEWATER OIL COMPANY, AND TENNESSEE GAS TRANSMISSION COMPANY, PETITIONERS

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, LONG ISLAND LIGHTING COMPANY, AND PUBLIC SERVICE ELECTRIC AND GAS COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE

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v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, LONG ISLAND LIGHTING COMPANY, AND PUBLIC SERVICE ELECTRIC AND GAS COMPANY

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE

OPINIONS BELOW

The opinion of the Court of Appeals (R. 653–662) is reported at 257 F. 2d 717. The opinions of the Federal Power Commission (R. 484–497) are reported at 17 F.P.C. 880.

JURISDICTION

The judgment of the Court of Appeals was entered on June 30, 1958 (R. 663). Petitions for re-

hearing timely filed were denied on August 27, 1958 (R. 667). The petitions for a writ of certiorari were filed in No. 518 on November 14, 1958 and in No. 536 on November 24, 1958. They were granted on January 12, 1959 (R. 669). The jurisdiction of this Court is based on 28 U.S.C. § 1254(1), and Section 19(b) of the Natural Gas Act, 15 U.S.C. § 717r(b).

STATUTES INVOLVED

The pertinent portions of the Natural Gas Act, 52 Stat. 821, 15 U.S.C. 717, *et seq.*, are set out in the Appendix, *infra*, pp. 106–112.

STATEMENT

This proceeding concerns the validity of an order of the Federal Power Commission authorizing sales of natural gas by four independent producers to an interstate pipe line company for transmission and resale in interstate commerce.

The proceeding was initiated by the application of the four producers, Continental Oil Company, The Atlantic Refining Company, Cities Service Production Company and Tidewater Oil Company (the "Catco" group) for certificates of public convenience and necessity under Section 7 of the Natural Gas Act (15 U.S.C. 717f) authorizing the sale to Tennessee Gas Transmission Company of large quantities of natural gas produced from wells situated offshore Cameron and Vermillion Parishes, Louisiana (R. 519–520). Tennessee Gas and a number of Tennessee Gas' distributor customers and other interested parties intervened in the proceedings which were heard by a Commission examiner in February 1957 (R. 335).

The need for and physical feasibility of the proposed sale were conceded in effect by all parties, and the sole issue of any importance at the hearing concerned the proposed price at which the sales were to be made (R. 338–342, 350).

The interveners contended that the proposed price, 21.4¢ per Mcf, had not been shown to be just and reasonable or to meet the public convenience and necessity, and that the Commission should authorize the sales only if the parties to the sales agreed to accept a lower price. Various conflicting suggestions were made as to the price level which should be imposed by the Commission (R. 379, 389, 394).

The examiner found that the sales were required by the public convenience and necessity and recommended that they be authorized (R. 335–359). He found that the proposed price, 21.4¢ per Mcf, was higher than any price Tennessee Gas was then paying for gas, but was not higher than prices currently paid by other pipe lines for on-shore sales "for smaller reserves and smaller future potentials" (R. 351). The examiner also found that the weighted average cost of gas to Tennessee Gas would be increased by .97¢ per Mcf if the sale was certificated at the proposed price (R. 350–351); and that no showing had been made that filing of the proposed price would result in an increase in the price governing Tennessee's other purchase contracts (R. 353). He refused to condition the authorization of the new sale on acceptance of a price lower than that the parties had agreed upon, concluding that inasmuch as there had been no "showing of imprudence or of abuse of discretion by management"

in contracting for the sale, the proposed price could be accepted temporarily as consistent with the public convenience and necessity, pending rate review proceedings under Section 5(a) of the Natural Gas Act. The examiner's position was summarized as follows in his decision (R. 352):

> Therefore, assuming management has discretion, within its proper range, to make a selection as to sources of gas supply, and, in the absence of any substantial indication in the evidence or even serious claim by interveners that the initial cost of this gas by itself would necessarily lead to an increase in Tennessee's rates to jurisdictional customers, no grounds appear for permitting this case under Section 7 of the Act to assume the character of a rate proceeding under Section 5(a) thereof.

The Commission affirmed the examiner's finding that the physical service itself was required by the public convenience and necessity, but concluded that further evidence should be taken on the possible effect of the proposed rate level on the public convenience and necessity. It remanded for further proceedings on that issue, stating (R. 522) "By the procedures adopted here, however, we do not necessarily imply that the rates at which the proposed sales would be made are not in the public interest". Inasmuch as the Commission had found that the physical service was required by the public convenience and necessity, and the producers' leases as well as the Outer Continental Shelf Lands Act (67 Stat. 462, 43 U.S.C. 1335) required that service commence by the end of 1958, it granted the producers temporary certificates authoriz-

ing the proposed sales pending the further hearings ordered (R. 523–524).[1]

The producers, in motions for reconsideration of this order, stated that they could not accept the risk of beginning service pending determination of their applicable rate[2] (R. 398–399):

> Applicants have concluded that the nature and extent of the economic risk is such as to foreclose their acceptance of the aforesaid temporary certificates. * * *
>
> * * * Applicants could not present [cost] evidence within any reasonable period in the future. This fact alone would prevent the concluding of such hearing prior to the date that deliveries must commence under the contracts. The parties cannot afford to commence construction until at least the initial rate is resolved.

However, the producers, to allay any concern of the Commission as to loss of its continuing power to control the rates provided by the Catco contracts because of pending legislation,[3] offered to amend the contracts

---

[1] Tennessee Gas was also granted temporary authority to construct necessary connecting facilities to take the gas from the producers (R. 524).

[2] The Commission has consistently taken the position that acceptance of any certificate, temporary or permanent, carries with it an obligation to continue the service in question unless the Commission finds that abandonment is consistent with the public interest. See *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 239 F. 2d 97 (C.A. 10), reversed on other grounds, 353 U.S. 944. Hence, the producers might not have been free to reject a permanent certificate subsequently offered them at a lower rate set by the Commission if they regarded that rate as inadequate.

[3] This was the so-called "Harris Bill", H.R. 6790, 85th Cong.

to eliminate existing provisions for periodic price increases and to authorize the filing of "indefinite" price increases which would be subject to the Commission's powers of review under the Gas Act or any pending subsequent amendment thereto.

The Commission, in response to this motion, ordered that the producers be granted permanent certificates authorizing the sales to Tennessee Gas (R. 530–533). The authorizations were conditioned, however, on the parties adopting the revised price increase provision proposed by the producers. In addition, the parties were asked to accept an initial price of 17¢ per Mcf, which was the highest price Tennessee Gas was then paying for gas, with the understanding that the producers would be allowed to file revised schedules increasing this rate to a maximum of 21.4¢, effective the day following commencement of deliveries, which rate would be suspended and placed immediately in effect subject to refund (R. 526–529). The order required that the proffered certificates, to become effective, must be accepted in writing by the producers within 30 days (R. 532).

Tennessee Gas, the purchaser, applied for rehearing of this order, stating (R. 418) that it had been "definitely advised by the producer-applicants that they will not amend Section 10 of the contract so as to change the initial rate from 21.4 cents per Mcf to 17 cents per Mcf", and that certificates in the form proffered by the Commission would be rejected by the producers and the contracts terminated.

The Commission granted the motion for rehearing and ordered argument of the questions presented by

the producer applications (R. 424–427). At the argument, producers' counsel made it clear that, if the Commission persisted in requiring an initial 17¢ per Mcf price, they would withdraw their certificate applications, terminate the contracts, and attempt to dispose of the gas through non-jurisdictional sales to industrial users in the Gulf Coast area, or elsewhere in the intrastate market.[4]

The Commission, as a result of the producers' position, reconsidered the question whether the public convenience and necessity justified certificating the sales at the proposed price. The Commission had found in its original order that it could not authorize the sales at the 21.4¢ per Mcf price consistent with the public convenience and necessity (*supra*, p. 4) although it pointed out that there was nothing in the record to indicate that that price was in any way unreasonable.[5] It had also found (R. 521) that the sale, apart from price, was required by the public convenience and necessity since (1) there was a tremendous unsatisfied need for gas in the areas served by Tennessee Gas' system; (2) the Catco reserves were the only known large scale uncommitted reserves located at an economical distance from Tennessee Gas' line so that it was highly uncertain whether comparable gas reserves could be substituted for the Catco gas; and (3)

[4] Transcript of oral argument, Docket No. G–11024, *et al.*, June 12, 1957, pp. 348–369, 415–435.

[5] The 21.4¢ per Mcf price was equal to or lower than a number of other current prices for gas produced in the same area from wells on dry land (R. 351), and the Catco wells were located between 15 and 25 miles offshore in the Gulf of Mexico in as much as 90 feet of water (R. 520).

the Catco gas, assuming that the producers persisted in their refusal to sell in the interstate market at a price fixed initially by the Commission, would in all probability be employed as boiler fuel by industrial purchasers—a low grade and socially wasteful use of this fuel.

Since it would have been impossible, practically speaking, for the Commission to evaluate critically the producers' repeated statements that they would refuse to sell their gas at a 17¢ price, the Commission was confronted with the possibility, if not the probability, that the gas would be lost to residential and other high-grade consumer uses in the interstate market, should it impose a price condition. Faced with this conflict between the demonstrated need for the gas and the producers' announced intention of exercising their right to refuse to sell except at their own price, the Commission felt forced to reexamine its earlier conclusion that the sales could not be authorized at the contract price consistent with the public convenience and necessity. As its order stated (R. 487), it confronted "the difficult problem of how to assure the delivery of [the Catco] gas to the large market served by Tennessee Gas, and at the same time protect the consumers from an unreasonably high price".

Weighing against the need for a price condition was the fact that the price differential of 4.4¢ per Mcf between the contract price and the proposed conditioned price, if ultimately found unreasonably high, could affect consumers only during the period between commencement of sale and Commission deter-

mination of a reasonable price for the gas in Section 5(a) proceedings which had been or would be ordered by the Commission involving the producers' rates; and even during this period, the higher contract price could have an adverse effect on consumers only if Tennessee Gas were to pass it on to its distribution company customers which, in turn, passed it on by rate increases to their customers, the consumers.

Assuming that Tennessee had been allowed to pass on the increase, the average price paid by distributors for Tennessee's gas during the current period would have increased only 1.4 per cent as a result of Tennessee Gas' purchasing the Catco gas at the 21.4¢ per Mcf price, rather than the proposed 17¢ price.[6] On the further assumption that the distributors in turn were able to pass on to their customers the one-half cent per Mcf increase, this would still have amounted only to a small fraction of the cost of the gas to the residential consumers.[7] See *infra*, pp. 102–103.

The Commission concluded, therefore, that the risk of adverse effect on the consumer from the 21.4¢ gas was sufficiently slight to be more than overbalanced

[6] That is, Tennessee's current average price to distributors as shown by the Commission's records is 36¢ per Mcf. Assuming that the full average price increase to Tennessee, as a result of purchasing at 21.4¢ per Mcf rather than 17¢ per Mcf, or .488¢ per Mcf, was passed on to its distributor customers, this would amount to an increase of 1.4 per cent over the current average price paid by distributors.

[7] The rates paid for gas by residential consumers in three states served by Tennessee Gas, New York, New Jersey and Massachusetts, ranged between $1.52–$2.20 per Mcf in 1957. Mines Mineral Market Report M.M.S. No. 2833, U.S. Department of Interior, Bureau of Mines.

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by the need for that fuel in the Tennessee Gas system. It reconsidered and reversed its original finding that the contract price had not been shown to be consistent with the public convenience and necessity, and authorized the sales at 21.4¢ per Mcf pending review of this price under Section 5(a) (R. 489–492). Concurrently, it ordered that the 21.4¢ price be investigated as to reasonableness in Section 5(a) proceedings covering the sales of each of the four producers,[8] stating that "By this means relief can be afforded to the consuming public if it should be found that the 21.4 cent initial rate to be charged for the off-shore gas is excessive" (R. 488).[9]

The New York Public Service Commission, and two gas distributors purchasing from Tennessee Gas, applied for rehearing of the Commission's order (R. 447–474), and when this was denied (R. 541) sought review of the order in the Court of Appeals for the Third Circuit under Section 19(b) of the Natural Gas Act (15 U.S.C. 717r(b)). The Third Circuit vacated

[8] Three of these investigations, involving the rates of The Atlantic Refining Company, Tidewater Oil Company, and Continental Oil Company were then in progress; the Commission's order directed that a fourth Section 5(a) proceeding be held concerning the rates of the remaining producer, Cities Service Production Company (R. 488). The Section 5(a) proceedings initiated by the Commission are currently in hearing, and rate determinations involving the Catco sales will be made as soon as sufficient service experience becomes available to permit comparison of operating costs and revenues.

[9] The Commission also required the applicants to amend their contracts to eliminate fixed price escalation provisions and substitute "indefinite pricing clauses" as originally proposed by the producers in their motion for reconsideration of the Commission's first order (R. 489–491).

the certificate order mainly on the grounds discussed *infra*, pp. 19–30.

SUMMARY OF ARGUMENT

I

The Commission did not seek certiorari in this proceeding in view of the pendency of *Oklahoma Natural Gas Co.* v. *Federal Power Commission* (No. 288, this Term, dismissed, February 20, 1959); and given the present posture of this case, it does not urge that the decision below be reversed.

II

The grounds expressed by the Court of Appeals for its decision are patently erroneous, however, and should be disapproved by this Court. A regulatory body is not deprived of jurisdiction to consider an application for a certificate of public convenience and necessity merely because the applicant indicates its unwillingness to aquiesce in a revision of its proposal which has been suggested by the agency. The fact that an applicant remains free to refuse to serve at terms proposed by the agency does not mean that it can limit or control the agency's examination of the public interest in the proposed service.

III

Broad questions sought to be raised by the petitioners as to the validity of the Commission's practice in certificating proposed services by gas producers need not be reached by this Court. These issues were neither argued to nor decided by the lower court

which expressly refused to pass upon them. Rather, the issue raised by the petitioners below was whether the Commission should have certificated the proposed service, given the facts and procedural history of the Commission proceeding. The Third Circuit, as noted, appears to have decided the case on jurisdictional grounds. If this Court disapproves, as we urge that it do, the grounds of the decision below, it need not reach the broad questions raised by the petitioners. Despite the importance of the broad questions, and the need for ultimate consideration by this Court, we believe that the present record, because of its atypical character, does not fully reflect all facets of the public interest in the certification of new gas services. Hence, there are sound reasons why the Court should defer consideration of these issues until such time as they are squarely presented on an adequate record, such as that now pending hearing before the Third Circuit in *United Gas Improvement Co. and Philadelphia Electric Co.* v. *Federal Power Commission,* and *Public Service Commission of New York* v. *Federal Power Commission.*

IV

Should the Court reach the broader questions raised by the petitions, the language, history and purpose of the Gas Act unite in demonstrating that the Commission need not find that a proposed natural gas rate is "just and reasonable" before certificating a new gas service.

A. Sections 4 and 5(a) of the Natural Gas Act (App., *infra,* pp. 106–109) establish standards and

procedures for testing the lawfulness or "justness and reasonableness" of existing gas rates on file with the Commission. The conspicuous absence of any reference to these standards or procedures in Section 7(e) of the Gas Act, governing certification of new services, indicates that the sole test to be applied to proposed rates is that set out in the certification provision in Section 7(e), "public convenience and necessity". This is confirmed by the deliberate failure of Congress to give the Commission suspension power over initial rates, as well as by the uniform interpretation given the "public convenience and necessity" standard as requiring an evaluation and balancing of all factors affecting the public interest, including the public need for gas. This does not mean that proposed rates are not relevant to the public convenience and necessity, for quite the contrary, they are a factor which must always receive consideration, but only that proposed rates need not be evaluated under a standard independent of public convenience and necessity.

B. The legislative history both of the original Gas Act and the 1942 amendments adding the existing Section 7 certificate provisions, demonstrate that proposed rates are only one of a number of factors which Congress intended the Commission to consider in authorizing new gas services, and that no one factor can be given predominate weight in every case under the congressionally approved standard.

C. This conclusion is further confirmed by the consistent refusal to appraise the reasonableness of proposed rates in certificate proceedings of every federal

regulatory body administering a statute parallel or equivalent to the Gas Act.

D. The District of Columbia Circuit, the only court thus far to pass on the question, has twice held in *Florida Economic Advisory Council* v. *Federal Power Commission,* 251 F. 2d 643, certiorari denied, 356 U.S. 959, and *Oklahoma Natural Gas Co.* v. *Federal Power Commission,* 257 F. 2d 634, dismissed, February 20, 1959, that the Commission need not find proposed rates just and reasonable before certificating new gas services.

V

A. The Commission has not abused its discretion in refusing in the great majority of certificate proceedings to pass on the reasonableness of proposed gas rates. Although the Commission has imposed specific or contingent rates in a small number of pipeline certificate proceedings where serious questions of lack of economic feasibility or dangers of discrimination were presented, it would not have been feasible or desirable to follow this practice in all contested producer certificate proceedings during the early stages of producer regulation. Marked economic and technical differences between the pipeline and producer industries would have made it impossible to apply the formulas, principles and techniques of pipeline regulation directly to the independent producers. In the absence of a workable rate formula, the Commission could not set reasonable rates in producer certificate proceedings. It would also have been impracticable during the early stages of producer regulation to defer consideration of the reasonableness of proposed

rates by imposing contingent or interim rates. Such a procedure, if followed in all contested cases, would have tended to stifle gas production to the heavy detriment of consumers, if only because the absence of established rate formulae or regulatory principles would make it impossible for the producer prior to drilling to forecast even the general area of the rate which ultimately would be found reasonable by the Commission. Additionally, it would be impracticable in a majority of cases for the Commission to determine the reasonableness of isolated rates governing proposed individual sales, because of the need to make cost allocations based on the over-all operations of the producer, which can only be accomplished in system-wide Section 5(a) proceedings. Such Section 5(a) proceedings are now in progress involving almost all major producers and production areas. The information obtained in these proceedings will provide a necessary first step toward development of the formulas and technique which will make possible effective producer rate regulation in the consumer interest.

B. During the present, initiating period of producer gas regulation, gas consumers have not been injured as a result of the Commission's practice of not pre-determining initial producer rates in producer certificate proceedings. The average price paid by residential gas consumers has increased only slightly during this period, less than the average increase in consumer prices, despite rising costs incurred by gas pipelines and producers.

It follows that the procedures employed by the Commission in certificating producer sales have been fully

consistent with the main purpose of the Act, and that there is no justification for restricting the Commission's discretion at this stage of producer regulation to the use of any preconceived method or formula of producer regulation.

ARGUMENT

I

THE INTEREST OF THE FEDERAL POWER COMMISSION

The Federal Power Commission has a clear and obvious interest in this proceeding which involves the validity of certificates and orders issued by it pursuant to Section 7 of the Natural Gas Act. Since the Commission did not seek certiorari to review the judgment of the Third Circuit, and has not been named as respondent, it files this brief *amicus curiae* in order to apprise the Court of its view of the opinion and decision below and the scope of the issues before the Court.

The Third Circuit's decision issued shortly after the ruling of the District of Columbia Circuit, favorable to the Commission, in *Oklahoma Natural Gas Co.* v. *Federal Power Commission,* 257 F. 2d 634 (certiorari granted, 358 U.S. 877, dismissed on petitioner's motion pursuant to Rule 60, February 20, 1959). The *Oklahoma Natural* decision raised certain important questions as to the scope of the Commission's regulatory authority and the validity of its procedures in certificating new sales of independent producers of natural gas. In view of the current importance of these issues for the administration of the Natural Gas Act, the Commission

did not oppose the grant of certiorari in *Oklahoma Natural* when review was sought in that proceeding in August 1958.

The broad questions of statutory authority and administrative discretion involved in the *Oklahoma Natural* proceeding were not argued to the Third Circuit in the present cases, see *infra*, pp. 19–27; and its opinion on June 30, 1958, which expressly pretermitted those issues, seems largely based on other grounds. Although the Commission disagreed vigorously with the stated grounds of the decision below and sought rehearing (R. 666), the actual decision (as contrasted with the opinion) appeared at that time to rest mainly on its particular facts and hence not to raise a question of general importance appropriate for resolution by this Court.

Additionally, when the Commission and the Solicitor General were required to consider applying for certiorari following denial by the Third Circuit of its application for rehearing on August 28, 1958, intervening events had further reduced the significance of the Third Circuit's decision. In July 1958, the producer applicants began sales to Tennessee Gas pursuant to the Commission authorization.[10] Hence, when the court below denied rehearing in August 1958, it was no longer possible for the producers to abandon their service to Tennessee Gas, absent a finding by the

[10] The Third Circuit has stayed issuance of mandate pending review by this Court (R. 668). During the period July 1958 through December 1958, Tennessee Gas purchased 17,049,256 Mcf of gas from the Catco reserves under the contracts here in question at a cost of $3,869,536.

Commission under Section 7(b) of the Natural Gas Act (15 U.S.C. 717f(b)) that this was consistent with the public convenience and necessity. *J. M. Huber Corp.* v. *Federal Power Commission,* 236 F. 2d 550 (C.A. 3), certiorari denied, 352 U.S. 971; *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission,* 239 F. 2d 97 (C.A. 10), reversed on other grounds, 353 U.S. 944; see also *Pennsylvania Water & Power Co.* v. *Federal Power Commission,* 343 U.S. 414, 421-424. It followed that the producers—solely as a result of their decision to begin service while a petition to review the Commission's order was still outstanding—were no longer free to refuse to sell their gas and to reject a permanent certificate. In view of this fact and inasmuch as the Third Circuit's judgment in effect requires reimposition of the original contingent price requirement which the Commission had revoked to ensure the availability of the Catco gas to Tennessee's customers, the Commission concluded that the decision below (as opposed to the stated grounds for that decision) had ceased to have general significance.[11]

For these reasons, the Commission did not seek certiorari, and it does not now urge that the decision below be reversed. But the Commission does urge strongly that the main grounds on which the court below appeared to reach its decision should be disapproved by this Court, since these are patently erroneous and will, if allowed to stand, introduce wholly unnecessary confusion into the principles governing review of federal agency action.

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[11] We appreciate, of course, that the decision may retain considerable economic significance for the present petitioners.

Moreover, the parties to these cases have raised the broader issues which were presented in *Oklahoma Natural,* No. 288, and it is therefore appropriate, now that No. 288 is no longer before the Court, for the Commission to set forth its position on those questions in these cases—if the Court should reach the broader issues.

II

THE MAIN GROUNDS GIVEN FOR THE DECISION BELOW ARE ERRONEOUS

A. *The Commission had jurisdiction to consider the producer applications.* The Third Circuit seems to have declared that the Power Commission had no jurisdiction to consider a natural gas company's proposal for a service extension where the proposal included a firm price (based on a negotiated contract) for the sale of gas, and the company refused to accept an alternative price suggested by the Commission. The grounds expressed for this conclusion are not that the Commission should have refused in this particular case to authorize the service, but rather that it had no jurisdiction even to consider the proposal on the terms submitted by the company. As the Third Circuit stated at the outset of its discussion (R. 658):

> The petitioners pose substantially similar questions on the merits of the case, namely, whether the Commission committed error in its order of June 24 * * * We conceive of the question, however, as a more fundamental one, involving the statutory jurisdiction of the Federal Power Commission. *It is whether the Commission has authority to consider an ap-*

> *plication for a certificate under Section 7(e) where the terms of the application limit the scope of the inquiry which the Commission is required to make for a determination of public convenience and necessity.* [Emphasis added.]

The court below has concluded therefore that the Commission (and by extension any comparable federal regulatory agency) cannot even consider a service proposal where the applicant limits its proposal to specified terms and conditions and indicates its unwillingness to provide the service on another basis. Thus, the court states in elaboration (R. 662):

> Congress has not given the Commission power to inquire into the issue of public convenience and necessity where, as here, the applicant circumscribes the scope of that inquiry by attaching a condition to its application requiring the Commission to forego the consideration of an element which may be necessary in the formulation of its judgment. Otherwise stated, the Commission has not been endowed by Congress with jurisdiction to conduct a *limited* inquiry.

In the court's view, a regulatory body does not even possess jurisdiction to examine a service application once the applicant has made it clear that it contains a firm provision of any kind, since such a provision would require "the Commission to forego the consideration of an element which may be necessary in the formulation of its judgment" (R. 662).

This is a startling conclusion. Most new service applications to regulatory bodies are inferentially or explicitly made on a firm basis, and applicants fre-

quently indicate at some point in the proceeding that they will not go forward with their proposals unless certain minimum terms are accepted by the agency. Since an applicant, with certain limited exceptions, generally cannot be compelled against its will to provide a service (*infra*, pp. 26–27), it is entirely proper, and may even be necessary, for it to express its views as to whether or not proposed conditions or revisions of its application by other parties or the agency would be acceptable to it.

Furthermore, such expressions of intent or opinion on the part of an applicant cannot, as the court below believed (R. 662), in any way "circumscribe" the scope of the Commission's inquiry, which should and can go forward to its normal conclusion regardless of the applicant's position. Thus, to take an example, an applicant seeking a broadcasting license from the Federal Communications Commission could, with propriety, at any point in the proceeding inform the Commission that it would not accept a license limited to a certain transmission power output (or any other such restriction), because in its view the limitation would make the service uneconomic. This would not prevent that Commission from continuing to explore all of the factors affecting the public interest in the broadcasting area in question. At the conclusion of its investigation, the Commission could either approve the application as submitted, reject it, or offer the applicant an alternative which it (the applicant) could then accept or reject. Similarly, an applicant for a transportation license before the Interstate Commerce Commission or Civil Aero-

nautics Board cannot limit the scope of the agency's inquiry merely by proposing a specific and definite service extension, since the agency's powers of inquiry are entirely independent of the positions taken by applicants before it.

It follows that there was nothing illegal in the producers rejecting the alternative price proposed by the Commission in this case on the ground that the sale would not produce a sufficient return at the 17¢ per Mcf rate. The fact that the producers took such a position could not in any way have circumscribed or limited the Commission's consideration of the issues bearing on the public convenience and necessity.

Additionally, since, as we have said, firm proposals are more the rule than the exception in federal licensing proceedings, the decision below, if literally applied, would seemingly cast doubt upon the large number of licenses or certificates granted by federal agencies where the applicant has insisted on the retention of a particular term and made its position clear at any point in the proceeding. Although we do not believe that the decision was intended to have this scope, but rather to be limited to some extent at least by the particular history and facts of this case, the bare possibility of such an interpretation serves to expose the fallacy at the root of the Third Circuit's reasoning.

B. *No issue is presented as to the applicants' willingness to conform to the provisions of the Natural Gas Act.* The court below attempted to buttress its conclusion that the Commission lacked jurisdiction over these producer applications by asserting that

"The action of the applicants in curtailing the decision-making power of the Commission demonstrates their unwillingness to conform to the provisions of the Act; this in itself would require the denial of the applications" (R. 662). We have shown that an applicant cannot "curtail" the Commission's "decision-making power", since the Commission's final decision can always be entirely independent of any position taken by an applicant. It is clear, moreover, that the specification by an applicant as to the conditions under which it will institute service does not *per se* constitute unwillingness "to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder", in the sense meant by Section 7(e) of the Gas Act, App., *infra*, p. 111.

The Commission may of course deny an application proposing an act or operation as not "required by the present or future public convenience and necessity", unless the applicant accepts certain modifications. However, the standard of "conform[ity] to the provisions of the Act," which is derived from an identical provision in Part II of the Commerce Act (49 U.S.C. 307(a)) (*infra*, pp. 69–71), has been interpreted uniformly by the Interstate Commerce Commission as requiring an estimate of the probability of an applicant's future compliance with Commission rules and regulations, rather than as a supplement to or expansion of the substantive standard embodied in the term "public convenience and necessity". The Interstate Commerce Commission, in determining whether an applicant will "conform to

the provisions of the Act", looks primarily to its past record of compliance with Commission rules and regulations. Applicants have been denied a certificate under this standard because of the evidence of past violations of Commission rules governing safety devices and programs, hours of service, medical tests, accident and other reports, accounting regulations, and unauthorized service. The Commerce Commission has never interpreted this language as proscribing an applicant merely because it has announced its intention of rejecting a certificate, should it include or omit particular provisions. See, *e.g.*, *Burnham Warehouses, Inc.*, 67 M.C.C. 799, 800; *Fortier Transportation Co.*, 67 M.C.C. 653, 655; *Fred L. Ridge*, 64 M.C.C. 69, 79; *L-P Gas Transport, Inc.*, 61 M.C.C. 611, 612, 620–621; *Paul D. Hurley*, 54 M.C.C. 362, 364; *Mathews Trucking Corp.*, 53 M.C.C. 737, 755–758; *Hughes Transportation, Inc.*, 46 M.C.C. 603, 622; *Harold F. Miller and J. T. Cahill*, 30 M.C.C. 737, 742–743; *Ralph G. Mattison*, 6 M.C.C. 353.

It follows that an applicant for a certificate under Section 7(e) of the Gas Act is not automatically disqualified merely because it refuses to acquiesce in a revision to its application proposed by the Commission.

C. *An applicant cannot be compelled to accept a certificate under Section 7 of the Gas Act.* The major grounds expressed for the Third Circuit's decision suggest that the Court *may* have been under the misapprehension that a natural gas company, once it has filed a service application under Section 7, can be compelled to accept a certificate of public convenience and

necessity on the Commission's terms. Although the opinion below does not take this position explicitly, much of what it says seems to be based on this premise. Thus, the court, as previously stated (*supra*, pp. 19–20) concluded that the Commission had no jurisdiction to give further consideration to the producers' application once they had indicated their unwillingness to accept a 17¢ per Mcf price. This implies that an applicant—in order to obtain consideration of his application and ultimate certification—must agree in advance of the hearing to accept whatever certificate is offered him by the Commission since otherwise his intransigence will oust the Commission of jurisdiction. Were this in fact the case, then once an applicant committed himself by filing an application, the Commission would have the practical power to compel him to serve on such terms as it might dictate in accordance with the statutory standards—if it had any jurisdiction at all over the application.

That this assumption may underlie the opinion below is also suggested by the court's further statement that (R. 662):

> Congress has also made it clear that the applicant must be *willing* to perform the services proposed and conform to the provisions of the Act. The action of the applicants in curtailing the decision-making power of the Commission demonstrates their unwillingness to conform to the provisions of the Act; this in itself would require the denial of the applications. The Commission's function is to regulate the sale of gas by producers willing to sell under regula-

> tions arrived at in accordance with the provisions of the Act. Such regulations may not be the result of bargaining with an unwilling seller.

The conclusion that the Commission should not "bargain" must mean that the Commission cannot explore the public convenience and necessity in the combined light of the applicant's proposals, the Commission's counter-proposals and the applicant's acceptance or rejection of those counter-proposals. But if the Commission does not have to consider the applicant's proposals, it can only be because it has the power to *compel* it to serve on the Commission's terms.

Whatever assumptions underlay the Third Circuit's opinion, however, it is clear that the Commission has no authority to compel an applicant to serve. The Gas Act, with certain very limited exceptions in Section 7(a), does not require natural gas companies to start serving on terms unacceptable to them. Section 7(a) of the Act, App., *infra*, p. 109, contains a limited power to compel a pipeline company to serve distributors in its immediate area. This provision, which is hedged with numerous conditions, completely negates the existence of any general Commission power to compel institution of service under Section 7(e). The legislative history of both the 1938 Act and the 1942 amendment to Section 7 of the Act also leave no doubt that an applicant cannot be compelled to serve. H. Rep. 709, 75th Cong., 1st Sess., pp. 5–6; Hearings, House Committee on Interstate and Foreign Commerce, 77th Cong., 1st Sess., on H.R. 5249, p. 23. Further, the courts which have

passed on this question have uniformly held that the Commission has no authority to require a gas company to add to its investment on terms unacceptable to it. *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 204 F. 2d 675, 678–681 (C.A. 3); *Central West Utility Co.* v. *Federal Power Commission*, 247 F. 2d 306, 312–313 (C.A. 3); cf. *Federal Power Commission* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498.

Hence, assuming that the opinion below is based on such a supposition, there can be no doubt that it rests upon a fundamental misapprehension as to the scope and purpose of the Natural Gas Act.[12]

III

QUESTIONS RAISED BY PETITIONERS AS TO THE GENERAL SCOPE OF COMMISSION AUTHORITY UNDER SECTION 7 OF THE NATURAL GAS ACT NEED NOT NECESSARILY BE REACHED BY THIS COURT IN THIS CASE

The petitioners in their separate statements of the questions presented invite this Court's consideration of a broad question as to the proper exercise of the Commission's certification authority under Section 7 of the Gas Act. Tennessee Gas Transmission Company, petitioner in No. 536, presents the following question as ripe for this Court's consideration (p. 2):

> Whether the Commission must, in an independent producer certificate case, determine the justness and reasonableness of the initial price

[12] Since the grounds selected by the court for its decision had not been argued or mentioned by any party at the time of its decision, the court did not have the benefit of briefs or citation of authority on this problem.

> when a question is raised as to the propriety of such initial price, or whether it can defer such matter for determination in a full rate investigation under Section 5(a) of the Natural Gas Act.[13]

Petitioners thus seek to raise in this Court an issue which neither they nor any intervening party argued to the Court of Appeals, and which was expressly pretermitted by the court below. It would appear, as we shall indicate, that this broad issue need not be reached by this Court in order to affirm the judgment in this case. Should the Court elect, however, to decide that statutory issue, the Commission's position is set forth in Points IV and V of this brief, *infra*, pp. 32–104.

As the petitioners admit (petition in No. 536, p. 18; see also petition in No. 518, p. 7), the "basic issue" presented to the Third Circuit by all parties below was "whether the Commission abused its discretion by declining to condition the certificate on a lower initial price", in the particular circumstances where it had twice found on the same record such a condition to be required by the public convenience and necessity. Since the Commission had reversed itself on this issue without receiving additional evidence, the petitioners below[14] argued that the Com-

[13] Basically the same question is stated by the parallel petition for writ of certiorari in No. 518, p. 2:

> Must the Commission convert a certificate proceeding, under Section 7 of the Natural Gas Act, into a rate case when a question is raised as to the initial price?

[14] The Public Service Commission of New York in No. 12,401, and Long Island Lighting Company and Public Service Electric and Gas Company in No. 12,403.

mission's subsequent finding that the 21.4¢ per Mcf price met the public convenience and necessity was not supported by sufficient evidence. The issue, as thus framed, is summarized in the Third Circuit's opinion (R. 660–661):

> The Commission defends its action by claiming the right to change its mind just as a court might do on rehearing, citing *Cia Mexicana de Gas* v. *Federal Power Commission,* 167 F. 2d 804 (C.A. 5, 1948). The petitioners, however, do not argue to the contrary. Their position is that, since in its first two orders the Commission determined that the record lacked sufficient evidence upon which to base a finding that the sale at the proposed rate would be in the public interest, and as the final order was based upon the same record, there is still insufficient evidence to support such a necessary finding.

None of the parties before the Third Circuit argued that the Commission was required by the Gas Act to make a determination of the "justness and reasonableness" of a proposed initial price, within the meaning of the rate sections of the Act, before certificating new gas sales under Section 7(e), App., *infra,* p. 111, the broader question which the present petitioners now seek to present. Rather, the petitioners below (see footnote 14, *supra,* p. 28 (respondents here)), argued that the Commission is required in contested cases to appraise a proposed rate in the light of the "public convenience and necessity," the applicable standard under the certificate provision in Section 7(e); and that it had failed to do so in this case because of the inadequacy of the record, and

hence had abused its discretion. Since the Commission has never at any point contested this general principle, and argued below that it had made such an appraisal in this case, the issue between the parties in the court below reduced to the question whether in fact the Commission had made an adequate appraisal in this particular case and on this particular record.

The Court of Appeals did not appear to reach the issue thus presented by the parties, since it held that the Commission should have dismissed the application for lack of jurisdiction, *supra,* pp. 19–20. It also pretermitted for the same reasons the broad questions presented here by petitioners which had been suggested, not by the parties, but by the intervening *Oklahoma Natural* decision. As the opinion states (R. 659):

> While the Commission probably should always consider the impact of the proposed initial rate in its determination of public convenience and necessity, we do not reach the question of whether the Commission must fix the initial rate when its inquiry demonstrates that there is a substantial question of the reasonableness of that initial rate. See *Oklahoma Natural Gas Co.* v. *Federal Power Commission,* and the dissenting opinion of Judge Bazelon, —— F. 2d —— (C.A.D.C., decided May 22, 1958).

If this Court determines, for reasons which we have set forth (*supra,* pp. 19–27), that the grounds relied on by the Third Circuit are clearly incorrect and must be disapproved, then the primary question before it

will be whether the Commission erred in granting a certificate on the facts of this particular case.

Should the Court invalidate the Commission's ultimate finding that the 21.4¢ per Mcf rate met the public convenience and necessity on the ground that it was not supported by sufficient evidence, and hence constituted an abuse of discretion in the circumstances of this particular case, the judgment below could be affirmed without reaching the question of whether the Commission *must* make a finding of justness and reasonableness or impose a contingent price in *every* disputed Section 7(e) certification proceeding.

We do not urge that the judgment below in this case should be reversed. We submit, also, that there are sound reasons why the Court should not undertake to decide these broader questions on this record. Although we believe that the broader issues are sufficiently important so that they should ultimately be decided by this Court, the present record because of its atypical character, unlike the *Oklahoma Natural* proceeding, does not fully reflect the various factors—legal, economic and practical—which affect or constitute the public interest in natural gas services and which should therefore receive consideration by the Commission and the courts in ascertaining public convenience and necessity.

Furthermore, the issue raised by petitioners is squarely presented in proceedings now pending before the Third Circuit on petitions to review a Commission order, issued on a record comparable in scope and character to that in *Oklahoma Natural,* which authorized sales by natural gas producers at a price chal-

lenged by one of the present respondents, after a Commission finding that the proposed price met the public convenience and necessity. *United Gas Improvement Co. and Philadelphia Electric Co.* v. *Federal Power Commission*, C.A. 3, No. 12,797; *Public Service Commission of New York* v. *Federal Power Commission*, C.A. 3, No. 12,805. Since the Commission refused in those cases to make findings as to the reasonableness of the proposed rates, or to require a contingent rate, the Third Circuit will have an opportunity to decide the basic issues which it did not reach in the present case; and its decision will be reviewable on certiorari by this Court.

IV

THE COMMISSION IS NOT REQUIRED TO FIND PROPOSED GAS RATES "JUST AND REASONABLE" BEFORE CERTIFICATING GAS SERVICES

We have pointed out (*supra*, pp. 27–32) that the Court need not reach the general issues presented by petitioners as to the validity of the Commission's customary treatment of initial rates proposed by independent producers, since there is a prior question before the Court as to the exercise of the Commission's discretion on the particular facts of this case. Should the Court undertake to decide the broader questions, however, the Commission's position is set forth in the balance of this brief.

Petitioners have argued that implicit in the decision below is the holding that the Natural Gas Act requires the Commission, before certificating a proposed gas service, to find in every case that the price

agreed on by the parties to the sale is "just and reasonable". In this view, the Third Circuit has decided that the Commission must either hold a rate hearing prior to granting a certificate or that it must require as a condition to authorizing the service that the seller accept retroactively the rate found reasonable in a subsequent rate hearing.

We have already noted (*supra*, pp. 28–30) that this broad issue was not reached (in our opinion) by the Third Circuit. We shall now show that in any event the Gas Act contains an explicit mechanism for reviewing wholesale gas prices which is restricted in application to prices on file in *existing* rate schedules, and does not apply to rate *proposals* in Section 7(e) certification proceedings. Thus, although the proposed rate is plainly an element affecting the public convenience and necessity which the Commission must consider in authorizing new gas services (see *infra*, pp. 39–47), it need not make a formal rate determination as a precondition to every service authorization; such a determination in appropriate cases can properly be made in separate Section 4(e) and Section 5(a) proceedings passing upon the rate schedules filed by the company seller.

We shall also show that this view of the Act is entirely consistent with and fully supports the primary purpose of Congress in protecting the consumer against unreasonable gas rates, and with this Court's prior interpretation of the Act in cases, *inter alia*, such as *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591; *Phillips Petroleum Co.* v.

State of Wisconsin, 347 U.S. 672; and *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332.

A. THE LANGUAGE OF THE NATURAL GAS ACT DEMONSTRATES THAT FORMAL GAS RATE DETERMINATIONS ARE TO BE MADE IN PROCEEDINGS UNDER SECTIONS 4(e) AND 5(a), NOT UNDER SECTION 7(e)

1. *The standard of "just and reasonable" applies only to rate proceedings under Sections 4 and 5; the omission of power to suspend initial rates shows that the just and reasonable test does not apply to such rates.* Sections 4(a)–4(e), together with Section 5(a) (App., *infra*, pp. 106-109), are the only provisions of the Natural Gas Act expressly concerned with rates.

Sections 4(a) and 4(b) contain a statement of principles or standards which the Commission must apply in appraising rates through the procedures outlined in the balance of Section 4. Section 4(a) states that "All rates and charges made, demanded, or received by any natural-gas company" for jurisdictional sales or transportation of natural gas must be "just and reasonable" and declares unlawful any such rate which is unreasonable. This provision on its face is thus confined to rates "made, demanded, or received", and does not refer to the proposed rates submitted with new service applications under Section 7(e). Section 4(b) proscribes unreasonable differences in such rates "as between localities or as between classes of service." Procedures for applying these standards are set forth in the three remaining subsections of Section 4. Section 4(c) requires that natural gas

companies file "schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission"; and Section 4(d) requires advance notice of any change in a schedule on file by filing substitute schedules.

Revised schedules filed pursuant to Section 4(d) may be set for a hearing by the Commission "concerning the lawfulness of such [changed] rate" pursuant to Section 4(e), and the Commission "after full hearings * * * may make such orders with reference thereto as would be proper in a proceeding initiated after it [i.e., the changed rate] had become effective."[15]

As this Court recognized in *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 340–341, the standard to be applied in reviewing rate changes under Section 4(e) is the same standard which is applied in appraising existing rates under Section 5(a) of the Act, which in pertinent part provides:

> *Whenever the Commission,* after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, *shall find that any rate,* charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is *unjust, unreasonable, unduly discriminatory, or preferential, the*

[15] Section 4(e) also provides for suspension of a rate change for a maximum of five months; the revised rate may be placed in effect subject to refund at the end of the suspension period.

> *Commission shall determine the just and reasonable rate*, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: * * *. [Emphasis added.]

See also *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103, 112 (fn. 7).

It will be noted that Section 5(a) (App., *infra*, pp. 108–109) incorporates expressly the principles stated in Sections 4(a) and 4(b): that is, it authorizes the Commission in its discretion to initiate a rate hearing, and to find that any rate incorporated in a field rate schedule is (1) unreasonable or (2) discriminatory and to "determine the rate * * * to be thereafter observed".

The certification provision, Section 7(e) (App. *infra*, p. 111), to the contrary, in providing for regulation of proposed services or facilities, makes no mention of the two rate standards contained in Section 4(a). It states that the Commission may grant a certificate

> * * * if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; * * *.

The failure to incorporate the two rate standards of reasonableness and non-discrimination in Section 7(e), coupled with their express incorporation in Section 5(a), cannot have been accidental; it demonstrates a clear Congressional purpose to adopt in Section 7(e) the traditional test of the "public convenience and necessity", not requiring formal rate determinations, which rather are to be made in proceedings under Sections 4(e) and 5(a) of the Act.[16]

In short, the inclusion of an express mechanism for applying the statutory rate standards in Sections 4(e) and 5(a) but not in Section 7(e) suggests on its face that the formal rate findings called for by the statutory standard ("just and reasonable") are to be made in hearings after the service has commenced, not in certificate proceedings. That this is the case is confirmed by the failure of Congress to give the Commission the authority to suspend *initial* rates in Section 4(e), which authorizes the Commission to suspend

[16] We have shown, *supra*, pp. 22–24, that the requirement in Section 7(e) (App., *infra*, p. 111), that an applicant be able and willing "to conform to the provisions of the Act" does not constitute a substantive test over and above "public convenience and necessity" by which the elements of the proposed service are to be appraised, but rather is a test of the applicant's ability and good faith. This language, as we have shown, *supra*, has been consistently interpreted as requiring a forecast of the probability that the applicant will obey lawful Commission regulations and orders, and conform to the reporting, accounting, and other similar requirements of the Act. The language in Section 7(e) does not incorporate the Sections 4–5(a) standards, therefore, so as to make proposed rates a test of the applicant's willingness to conform to the Act's provisions.

only rate changes filed under Section 4(d).[17] Had Congress intended to give the Commission an invariable duty of review, and an automatic veto, over the initial rates made by gas companies, it would almost undoubtedly have done so by making Section 4(e) (including its incorporation of the Section 5(a) standard) apply to all rate filings—not merely to rate changes. See *infra*, pp. 51–69. This would have allowed the Commission to set for hearing and suspend *initial* rate schedules when it regarded these rates as suspect.

Congress employed this technique in the Motor Carrier Act (49 U.S.C. 301, *et seq.*) which served as a model for the Natural Gas Act—including in particular Section 7(e)—by giving the Commerce Commission the power to suspend initial motor carrier rates under the Motor Carrier Act equivalent of Section 4(e) (49 U.S.C. 316(g)). See *infra*, pp. 69–74. Congress' failure to include a similar provision in the Gas Act is consistent only with an intent to leave the initial rate-making function to the companies themselves, with Commission review of initial rates only when required by special circumstances. See *infra*, pp. 86–93. Additionally, Congress in Section 4(e)

[17] Section 4(e) now reads that "Whenever any *such new* schedule [i.e., any rate change filed under Section 4(d)] is filed the Commission shall have authority * * *" to set it for hearing and suspend its effectiveness, and to apply the Section 5(a) rate standard from the filing date. The deletion of the words "such new" would have made Section 4(e) applicable to all rate filings, not merely to rate changes, and would have given the Commission express power to do exactly what respondents seek to compel it to do inferentially under Section 7(e).

(App., *infra*, p. 108) placed the burden of proof of showing the reasonableness of an increased rate on the seller, but did not do so in the case of an initial rate under Section 5(a). The face of the Act thus shows that it is unnecessary for every certificate applicant to carry the burden of showing the "justness and reasonableness" of proposed initial rates in Section 7(e) certificate proceedings, in addition to the burden of establishing that the service is required by the "public convenience and necessity".

2. *Uniform interpretation of the "public convenience and necessity" standard requires balancing of all elements, including rates.* That the "just and reasonable" test is not incorporated in Section 7(e) is also shown by the well-settled meaning of the standard adopted by Congress for gas certification proceedings under Section 7. Section 7(e) contains the conventional or traditional test governing new service—the "public convenience and necessity". *Infra*, pp. 42–44. Rates (as we shall show) are one of several elements bearing on the public convenience and necessity. It does not follow, however, that merely because rates are a factor in the "public convenience and necessity" that the Section 7(e) standard incorporates the "just and reasonable" standards of Section 4 and 5(a) so as to require a formal rate (*i.e.*, "just and reasonable" rate) determination in certificate proceedings. For Section 7(e) requires the Commission to evaluate *all* factors bearing on public interest, not only the proposed rates. It is settled that the public convenience and necessity encompasses all aspects of a proposed service, including such problems as whether

and to what extent there is an unsatisfied need for gas in the area to be served, whether the proposed service offers the greatest probability (when compared with the competing alternatives) of meeting the public needs in the area, the characteristics of the proposed rate structure, the adequacy of the gas supply, and the technical and economic feasibility of the over-all project. *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60, 65; *United States* v. *Detroit & Cleveland Navigation Co.,* 326 U.S. 236, 241; *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.,* 314 U.S. 498, 509–510; *Charleston & Western Carolina Ry.* v. *Federal Power Commission,* 234 F. 2d 62, 64 (C.A.D.C.); *Lang Transportation Corp.* v. *United States,* 75 F. Supp. 915, 926–929 (S.D. Calif.); cf. *Ayrshire Collieries Corp.* v. *United States,* 335 U.S. 573, 592–593). Since the traditional "public convenience and necessity" test requires a balancing, where necessary, of various (often conflicting) elements making up the public interest, the Commission cannot give controlling weight in every case to rates, which are only one of many factors which it must evaluate before authorizing a new gas service. This does not mean that rates are ignored in certificate proceedings but rather that they do not have to be evaluated under statutory standards independent of the public convenience and necessity. See *American Trucking Associations* v. *United States,* 355 U.S. 141, 149.

a. The Commission has invariably applied this principle in examining pipeline and producer rates as an element of the proposed rate structure which must

meet the public convenience and necessity, without converting certificate proceedings into formal rate hearings. It has examined the proposed rates, where possible, comparing them with other comparable rates of the applicant, and evaluating them in the light of its general familiarity with the operating conditions of the applicant and in conjunction with other elements of the rate structure, and the feasibility, desirability, and need for the proposed service. *Infra*, pp. 84–94. If in any case a rate appeared on its face exorbitant or discriminatory, or presented indications of a collusive bargain, this would raise a presumption that the proposed service could not meet the public convenience and necessity and would require a full hearing to determine the reasonableness of the rate. Thus, the Commission in a small number of pipeline certificate proceedings where the existence of monopoly power raises dangers of uneconomic service or discrimination has explored with great care the structure and level of the proposed rate. *Infra*, pp. 86–88. Similarly, in a number of cases involving temporary or permanent certificates where proposed producer rates presented strong possibility of discrimination or triggering of general price rises, the Commission has exercised its discretion to impose rate conditions, in order to meet the public convenience and necessity. See, e.g., *Signal Oil & Gas Co.* v. *Federal Power Commission*, 238 F. 2d 771 (C.A. 3), certiorari denied, 353 U.S. 923. Except in such exceptional cases, however, the Commission (as we show further, *infra*, pp. 85–93) has not either in pipeline or producer

proceedings imposed rate conditions or tested the statutory reasonableness of proposed rates under the "just and reasonable" standard. Rather, it has authorized the proposed service where a strong public need has been shown, and deferred consideration of the proper rate until subsequent proceedings held under Section 5(a) of the Act.

b. There can be no doubt that the balancing of the various factors, including public need, entering into the public convenience and necessity is permitted, and indeed required, by the Gas Act. That public need for gas service can be a major, even a predominant, element of the public convenience and necessity is shown by the many court decisions sustaining Commission action pursuant to Section 7(e). It has been held that the Commission may weigh the *public need* for natural gas against injury to competing fuel interests (*Charleston & W. C. Ry.* v. *Federal Power Commission,* 234 F. 2d 62, 64 (C.A.D.C.); cf. *National Coal Association* v. *Federal Power Commission,* 191 F. 2d 462, 467 (C.A.D.C.)); that in certificating a new gas service in an area served by another company the Commission can rely primarily, if not exclusively, on the *public need* for additional gas (*Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission,* 169 F. 2d 881, 883 (C.A.D.C.), certiorari denied, 335 U.S. 854); that it can deny authorization under Section 7(e) to transport gas for direct sale to industrial customers solely because of the *need of existing resale customers* for additional gas (*Panhandle Eastern Pipe Line Co.* v. *Federal Power Com-*

mission, 232 F. 2d 467, 473 (C.A. 3)); that it can certificate, over State conservation objections, facilities for direct industrial sales where the court concludes that "viewing the matter entirely from the standpoint of ***consumer demand for the gas,*** the evidence is of such conclusive character that it demands the finding that was made" (*Department of Conservation of State of Louisiana* v. *Federal Power Commission,* 148 F. 2d 746, 748–750 (C.A. 5), certiorari denied, 326 U.S. 717, emphasis added; cf. *United States* v. *Detroit & Cleveland Navigation Co.,* 326 U.S. 236, 240–241).

If, as respondents contend, the Commission must make a formal rate determination before certificating any proposed service, and may lawfully certificate only services at rates which are reasonable under the Section 4(a)–5(a) standards, obviously it could not apply the standard of public convenience and necessity in its traditional sense of evaluating and balancing all factors bearing on the public interest. Rather, it would have to give predominant weight to one element, the proposed rate. However, as we have shown, both the Commission and the courts have uniformly given the Section 7(e) public convenience and necessity test its traditional scope by permitting, and indeed requiring, Commission evaluation of *all* relevant factors and interests. Further, as we shall show *infra,* pp. 51–69, in examining the legislative history of the Natural Gas Act, Congress intended the Commission to consider all elements traditionally affecting

the public convenience and necessity in acting under Section 7, not merely or predominantly the one element of rates.

c. The fact that Congress did not expressly incorporate the "just and reasonable" standard in Section 7 but rather adopted the public convenience and necessity test confirms that it must have contemplated some division between the *initial* rate-making powers of the natural gas companies and the Commission's rate regulatory responsibilities.

Such a division has in fact already been recognized by this Court in exploring the interrelationship of Sections 4 and 5(a) in *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 338-344. In concluding that the Commission could not, by accepting a rate filing under Section 4(d) and making the required findings under Section 4(e), abrogate a fixed-price contract, the Court noted that Congress in the Gas Act intended that rate regulation would begin only after the rate schedule had been filed (350 U.S. at 339):

> * * * the Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public.

As *Mobile* recognizes, Congress contemplated that initial gas rates would be set in the first instance by the parties to a sale and would not at their inception be tested by the Section 4 standard of justness and rea-

sonableness. Although subsequent changes in the filed schedule would be subject to the notice, burden of proof, and suspension provisions of Sections 4(d) and 4(e), and any schedule on file could be examined for reasonableness by the Commission employing the Sections 4(a)–5(a) standard, the gas companies remained free to make their own bargain as to *initial* prices, subject to the Commission's Section 5(a) review powers. As the Court stated (350 U.S. at 338):

> In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts. * * *

See, for the same holding, *Phillips Petroleum Co.* v. *Federal Power Commission*, 258 F. 2d 906, 917 (C.A. 10); cf. *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103, 111–114.

The Gas Act in other words, expressly contemplates that there will be no formal Sections 4–5(a) regulation of the initial rate set in individual negotiations by private parties, which are left free to make their own "individualized arrangements" (350 U.S. at 339). Since the public interest in reasonable rates is protected by regulation of contracts made by the parties on file as rate schedules under the Section 4(e)–5(a) procedure, the Commission is not required to dictate prices in advance to the industry, but only to determine whether the proposed price, together with

other elements, meets the public convenience and necessity.[18]

[18] This conclusion is repeatedly spelled out in the *Mobile* opinion (emphasis added):

> The powers of the Commission are defined by §§ 4(e) and 5(a). The basic power of the Commission is that given it by § 5(a) to set aside and modify any rate or contract which it determines, after hearing, to be "unjust, unreasonable, unduly discriminatory, or preferential." This is neither a "rate-making" nor a "rate-changing" procedure. *It is simply the power to review rates and contracts made in the first instance by natural gas companies* and, if they are determined to be unlawful, to remedy them. * * * [350 U.S. at 341].
>
> * * * These sections [Sections 4 and 5(a)] are simply parts of a single statutory scheme under which *all rates are established initially by the natural gas companies, by contract or otherwise*, and all rates are subject to being modified by the Commission upon a finding that they are unlawful. The Act merely defines the review powers of the Commission and imposes such duties on natural gas companies as are necessary to effectuate those powers; *it purports neither to grant nor to define the initial rate-setting powers of natural gas companies* [*Ibid.*].
>
> [Section 4(d)] * * * provides *only* for *notice* to the Commission *of the rates established by natural gas companies* and for *review* by the Commission of those rates. *The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act* [350 U.S. at 343].
>
> All of the relevant provisions of the Act can thus be fully explained as simply defining and implementing the powers of the Commission to *review rates set initially by natural gas companies*, and there is nothing to indicate that they were intended to do more. Admittedly, the Act presumes a capacity in natural gas companies to make rates and contracts and to change them from time to time, but nowhere in the Act is either power defined. The obvious implication is that, except as specifically limited by the Act, the rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act. * * * [*Ibid.*].

We recognize, of course, that *Mobile* involved a construction of Sections 4 and 5(a) of the Act rather than the certificate provision, Section 7. However, respondents' basic contention—that the Commission, in order to protect consumers, must determine initial gas prices—is irreconcilable with the first premise of *Mobile:* that the Gas Act, unlike Part I of the Commerce Act, was not intended to displace completely the use of private contracts as an initial rate-setting mechanism, and that Sections 4(e) and 5(a) provided adequate protection to all parties against unlawful gas rates.[19]

3. *The Gas Act expressly contemplates the possibility that not every rate charged will be "just and*

[19] *Jersey Central Power & Light Co.* v. *Federal Power Commission*, 319 U.S. 61, concerned a similar question of whether the phrase appearing in Section 201(a) of the Federal Power Act (16 U.S.C. 824), "such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States", was to be read into every other part of the Power Act, including Section 203(a) (16 U.S.C. 824b) regulating acquisition of one public utility's stock by another, or whether it was to be given effect only in applying *inter alia* the Power Act rate-filing and review provisions (§§ 205, 206(a)) which are the exact equivalents of Sections 4 and 5(a) of the Gas Act. This Court concluded from the structure and history of the Power Act that the quoted provision, despite its generalized and unrestricted language, was to be given effect as a criterion only in applying the Power Act equivalents of Sections 4 and 5(a) (319 U.S. at 73–78). Similarly, *American Trucking Ass'ns.* v. *United States*, 355 U.S. 141, holds that the policy in Section 5(2)(b) of the Commerce Act (49 U.S.C. 5(2)(b)), limiting railroad acquisition of motor carriers, should not be applied mechanically in Section 207(a) certificate proceedings under the Motor Carrier Act (49 U.S.C. 307(a)), although the policy must be given consideration in such proceedings.

reasonable" in the statutory sense. Respondents may argue that since a proposed producer rate can be statutorily unreasonable, even when it is not exorbitant on its face, Congress could not have intended that the buyer and the ultimate consumers would pay such an unreasonable rate until such time as the Commission prescribed the reasonable rate under Section 5(a). We have shown, however, that Congress has required the objective of "just and reasonable" rates to be reached primarily through the Commission's review powers under Sections 4(e) and 5(a), *Mobile* (350 U.S. at pp. 341–345); and Congress presumed that the Commission would use its Section 4–5(a) powers effectively to protect the ultimate consumer against unreasonable gas prices.

Moreover, Congress deliberately denied the Commission reparation powers under the Gas Act. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 618; *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.*, 341 U.S. 246, 254; *infra*, p. 50, fn. 30. It follows that Congress must have contemplated that there would be periods during which the rates charged and paid would be other than those ultimately found "reasonable" by the Commission. Thus, the Act provides that the Commission can, by suspending a rate increase for a five month period under Section 4(e), require a gas seller to charge a rate which the Commission may subsequently find to be unreasonably low, even though there is no possibility of restitution. *Hope Natural Gas Company* v. *Federal Power Commission*, 196 F. 2d 803,

806–809 (C.A. 4). Similarly, after a rate has been approved by the Commission under either Section 4(e) or 5(a), a seller is permitted to continue to charge that rate indefinitely until such time as it is again reviewed by the Commission (following complaint or on its own motion) under Section 5(a), despite the fact that in the interim the rate may have become excessive. It is clear therefore that the Natural Gas Act, with its emphasis on private contracts, does not provide a mechanism ensuring that every gas rate charged and paid will at all times be "just and reasonable" in the statutory sense. See *Hope Natural Gas, supra,* 196 F. 2d at 808–809 (C.A. 4); cf. *Montana-Dakota Utilities Co.* v. *Northwestern Public Service Co.,* 341 U.S. 246, 251.

In addition, the purpose of the Gas Act was to fill a gap then existing between State regulation of production operations and State and municipal regulation of gas distribution. *Phillips Petroleum Co.* v. *Wisconsin,* 347 U.S. 672, 682; *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana,* 332 U.S. 507. When Congress undertook to regulate gas *wholesales* in order to supplement State regulation, it could have given the Commission the same power over wholesale gas rates which the Commerce Commission exercises over rates, including reparation authority, as well as the right to suspend initial rate schedules (*infra,* pp. 69–76). Congress deliberately withheld such reparation power, however, because it was regarded as unnecessary and inappropriate in a federal regulatory scheme "governing

merely wholesale transactions", where retail transactions were State-regulated.[20]

Since the Commission was forbidden to adjust rates retroactively in order to ensure that *all* rates charged and paid were reasonable and non-discriminatory, it follows that the possibility that gas sellers or consumers might be compelled to pay rates for limited periods which are excessive when measured against the rate standards of the Act is not contrary to the pattern of the Act. Such a result is inherent in the scheme of regulation chosen by Congress, which leaves the gas companies free in the first instance to determine rates and proposed service extensions and provides for price regulation only of existing rates, not proposed rates. Congress chose deliberately to preserve the private contract structure of the natural gas industry in adopting a scheme of federal regulation to an industry already heavily regulated by the States. Cf. *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332, 338.

It is therefore clear, we submit, that on the face of the Gas Act the exclusive procedure for applying the "just and reasonable" rate standards of Sections 4(a) and 4(b) to rate changes is provided by Sections

[20] S. Rep. No. 621, 74th Cong., 1st Sess., p. 20. A reparation provision had been included in a progenitor of the Gas Act appearing in a bill subsequently enacted as the Public Utility Act of 1935, but was deleted when it was opposed by State regulatory bodies as inappropriate and unworkable in view of the limited scheme of federal regulation contemplated by the Act. See Hearings, House Committee on Interstate and Foreign Commerce, H.R. 5423, 74th Cong., 1st Sess., pp. 36, 1685; Hearings, Senate Committee on Interstate Commerce, on S. 1725, 74th Cong., 1st Sess., pp. 43, 223, 247.

4(d) and 4(e), and to existing rates by Section 5(a). These provisions, as this Court has pointed out (*Mobile*, 350 U.S. at 344), provide protection for the public interest by allowing the Commission to review actual rates (not proposals) which have been negotiated by natural gas companies and their customers.

B. THE LEGISLATIVE HISTORY OF THE GAS ACT CONFIRMS THAT CONGRESS DID NOT INTEND THE COMMISSION TO PRE-DETERMINE INITIAL RATES

The legislative history of the Natural Gas Act also leaves no doubt that Congress contemplated that the gas companies in the first instance would set their own rates, and that the Commission was not expected to pre-determine initial prices governing new gas sales.

1. *The 1938 enactment.* The primary purpose of the Gas Act, as this Court recognized in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 610, was the protection of consumers against excessive gas prices which might result from the monopoly position of the large interstate gas pipelines whose sales in interstate commerce were not subject to State regulation.[21]

[21] The *Hope* principle has been frequently cited in later decisions of this Court, including *Phillips Petroleum Co.* v. *State of Wisconsin*, 347 U.S. 672, 685; and *Federal Power Commission* v. *Interstate Natural Gas Co.*, 336 U.S. 577, 581. Although there can be no doubt as to the correctness of this general view of the Act's purpose, *Hope* was a pipeline rate case under Section 5(a) of the Gas Act where the focus of emphasis was on the public interest in reasonable rates. This Court recognized in that case that it was not directly concerned with the standards applicable in Section 7, stating (320 U.S. at 612):

> [T]he Commission was not asked here for a certificate of public convenience and necessity under Section 7 for any

The Gas Act as originally enacted clearly reflected this basic preoccupation, since Congress at first gave the Commission only limited certification power over natural gas companies. Inasmuch as the main problem, as seen by Congress in 1938, was protection against monopolistic abuses (including discriminatory or exorbitant rates), the Commission under Section 7(c) of the original Act was given control over the initiation of only those new pipeline services entering a market supplied by another gas company. The Commission was directed to certificate such new services if required by "the present or future public convenience and necessity", for the primary purpose of facilitating price competition. It is also clear from the legislative history of the 1938 Act that Congress did not intend the Commission to set initial prices in certificate proceedings, but rather to rely for consumer protection on Sections 4 and 5(a) and the effects of competition which Section 7(c) of the Act was expected to enhance.

Much of the language subsequently employed in the Natural Gas Act, including Sections 4 and 5(a) as enacted but not Section 7(c), appears in a bill, H.R. 11662, introduced into the 74th Congress in 1936 by Chairman Lea of the House Interstate and Foreign

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proposed construction or extension. It was faced with a determination of the amount which a private operator should be allowed to earn from the sale of natural gas across state lines through an established distribution system. Sections 4 and 5, not Section 7, provide the standards for that determination. [See also 320 U.S. at 616–617.]

Certainly, nothing in *Hope* or the cases following it requires a restrictive interpretation of Section 7(e) so as to limit it solely or primarily to questions of rates.

Commerce Committee.[22] In hearings before a subcommittee of this Committee on H.R. 11662, Dozier DeVane, then Solicitor of the Power Commission, in presenting the Commission's views on the proposed bill, stated categorically that the rate powers provided by Sections 4 and 5(a) of the bill (which, as noted, were virtually identical with the provisions finally enacted), were restricted to existing rates, and did not apply to rate proposals (Hearings, pp. 28–29):

> Mr. LEA. Mr. DeVane, under what conditions would rates be put into effect?
>
> Mr. DEVANE. In the beginning?
>
> Mr. LEA. Yes.
>
> Mr. DEVANE. The companies will simply file their schedules.
>
> Mr. LEA. And those schedules would prevail unless the Commission saw fit to, after a hearing and notice, establish a rate?
>
> Mr. DEVANE. Yes, sir; those rates would prevail. The rates that the company makes effective at the date of filing are the rates that will continue in effect until they are changed either by the company, as provided in Section 4, or by the Commission after hearing.

[22] H.R. 11662 was a close copy of S. 2796 which had been introduced during the first session of the 74th Congress. The substance of H.R. 11662 was reintroduced as H.R. 12680, but died with the 74th Congress. A similar bill, H.R. 4008, was introduced into the 75th Congress. This bill was reintroduced with certain modifications as H.R. 6586, which was subsequently enacted as the Natural Gas Act. The Power Commission made no presentation in support of any bill subsequent to H.R. 11662; the hearings held by the House subcommittee in 1937 on H.R. 4008 prior to enactment were concerned with proposed amendments to the Commission-sponsored bill.

Mr. LEA. There would be, I take it, no duty upon the Commission under this bill in the absence of complaint or just reason to call for interference to establish rates.

Mr. DEVANE. No, sir; the Commission can only establish rates after investigation and hearing.

Now, that investigation can be undertaken under Section 5 of the bill either on the Commission's own initiative or upon complaint.

Mr. COOPER. Let me see if I understand you there. That is, the gas companies can establish their rates?

Mr. DEVANE. Yes, sir.

Mr. COOPER. They do not have to go to the Commission, they can establish them themselves?

Mr. DEVANE. You are talking about in the beginning now?

Mr. COOPER. Yes.

Mr. DEVANE. They file their schedule of rates.

Mr. COOPER. And they put them into effect.

Mr. DEVANE. Yes, sir.

Mr. COOPER. And anyone who wants to file a complaint goes to the Commission; is that right?

Mr. DEVANE. That is correct; and they can change their rates, Mr. Cooper, by filing new schedules under Section 4(d). After they have filed them with the Commission and announced those new rates, the Commission has the power to suspend and investigate and the suspending power extends for a period of 5 months.

Mr. COOPER. Well, does the Commission have

the power to suspend as soon as the protest has been filed?

Mr. DEVANE. Not in the case of protests, Mr. Cooper; no sir. The power of suspension only applies to a new rate.

Mr. COOPER. What I mean is this, if the gas company establishes a rate and someone files a complaint against that rate with the Commission, does the Commission automatically suspend the rate?

Mr. DEVANE. It has no authority to suspend that rate.

Mr. COOPER. I see. They first have to consider the case.

Mr. DEVANE. That is correct.

Although H.R. 11662 did not contain the limited certification provision provided by Section 7(c) of the bill finally enacted (App., *infra*, pp. 110–111), the eventual adoption of this provision, which first appeared in H.R. 4008 introduced by Chairman Lea into the 75th Congress, did not contradict in any way, but rather confirms, the original understanding of the Commission expressed by its Solicitor (*supra*, pp. 54–55) that initial gas prices were to be set by the companies—not by the Commission.

Section 7(c), as finally adopted in 1938, did not contain a "just and reasonable" standard but rather a direction to the Commission that it compare relative rates in the area in question before certificating a new service. In the hearings held on H.R. 4008 in 1937, Chairman Lea stated that he was personally responsible for the inclusion of the new limited certification provision (the original Section 7(c), App.,

infra, pp. 111–112), and that its primary purpose was to protect existing gas companies from destructive competition (Hearings, House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess., H.R. 4008, pp. 81–84). The Senate subsequently expanded the House Chairman's original concept of the provision by adding a proviso at the end of Section 7(c) which required the Commission, when it authorized service extensions into competitive areas, to give "due consideration" to the public interest in lower gas rates:

> * * * In passing on applications for certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest.

This proviso, which subsequently was concurred in by the House and appears in Section 7(c) as originally enacted (App., *infra*, pp. 111–112),[22] was designed to make it clear that the Commission in authorizing extensions should consider consumer interest in lower prices, as well as the interest of existing gas companies against destructive competition which had

[22] The proviso was deleted from Section 7(c) in the 1942 amendments to Section 7 which expanded the Commission's jurisdiction over gas services. See *infra*, pp. 63–65.

been Chairman Lea's expressed reason for adopting Section 7(c). The original Section 7(c) cannot be read as requiring the Commission to pass upon the justness and reasonableness of proposed rates in certificate proceedings. It does not impose any such requirement, but rather adopts a relative rate standard, requiring the Commission to compare the level of the proposed rate with the other pipeline rates in the area. Since the prior history of the 1938 enactment makes it clear that Congress and the Commission assumed that gas rates would be regulated under Sections 4 and 5(a), not under Section 7(c), the original Gas Act contradicts respondents' contention that Congress has always intended that the Commission would pre-determine initial prices. Relative rate levels were to be considered in Section 7(c) proceedings—not "justness and reasonableness" ascertained by conventional public utility rate-base methods—and only insofar as the Commission was directed to use its certificate power to break an existing service monopoly, when this would result in lower rates and would otherwise be in the public interest.[24]

2. *The 1942 amendments.* The history of Section 7 as subsequently amended in 1942 also leaves no doubt that the Section 4–Section 5(a) standard of "just and reasonable" was not applicable to Section 7, and that rates were regarded as only one of the elements of the public convenience and necessity which were to

[24] See the testimony of Commissioner Manly, Hearings, House Committee on Interstate and Foreign Commerce, on H.R. 5249, 77th Cong., 1st Sess., p. 19, quoted *infra*, pp. 63–64.

be considered by the Commission in authorizing new service.

By 1942 when the amended Section 7 was enacted, circumstances had changed greatly. The original Act had been passed during a period of economic depression in a relatively static economy. At such a time, the interest of Congress was necessarily focused on the prevention of price abuses in a market in which producer gas was in over-supply, but where the main sellers (the pipelines) held natural monopolies. By 1941 the effects of the defense economy were beginning to be felt, stimulating increased demand for natural gas and a resulting interest in proposed pipeline construction fully documented in the legislative history of the 1942 amendments.[25] These amendments, embodying a changed and expanded philosophy of federal gas regulation, were a response to the pressure of these conditions and to dissatisfaction with the existing Section 7(c).

For it was universally recognized by 1941 that the original Section 7(c) was a failure. The Commission had found Section 7(c) unworkable and undesirable for two principal reasons: (1) the lack of certificate authority over most pipeline extensions made it much more difficult to regulate the operation of such new extensions once initiated; and (2) the Section 7(c) requirement (App., *infra*, pp. 111–112) that the Commission, prior to assuming jurisdiction over a new service, decide the complex economic question of whether the "market" in question was "already being

[25] Hearings on H.R. 5249, House Committee on Interstate and Foreign Commerce, 77th Cong., 1st Sess., pp. 33–34, 61.

served by another natural-gas company" had proved unworkable.[26]

The pipelines did not oppose extension of federal regulation over their own operations, because the lack of a universally applicable and workable certification procedure made it difficult for them to promote and finance pipeline extensions in order to meet the growing need for gas.[27]

Generally expressed dissatisfaction with its then limited certification authority led the Commission to recommend amendment of Section 7(c) in its annual report to Congress for the fiscal year 1940.[28] This report shows that the Commission was at that time primarily concerned about its inability to control the rapidly expanding pipeline industry in the interests of conservation and most effective use of the avail-

[26] Hearings on H.R. 5249, *supra*, at pp. 81–84.

[27] Hearings on H.R. 5249, *supra*, at pp. 3, 35.

[28] The Commission in its 1939 report had already expressed dissatisfaction with Section 7(c) in view of the growing demand for natural gas, stating (p. 21):

> In its administration of section 7(c) of the Natural Gas Act the Commission is aware of the limitations upon its jurisdiction to pass upon applications for certificates authorizing the construction of new facilities. Under the terms of that section the Commission's jurisdiction extends only to applications for certificates authorizing the construction of facilities for the transportation of natural gas to "a market in which natural gas is already being served by another natural-gas company." This limitation upon the Commission's jurisdiction and the lack of clear definition of the word "market" have made more difficult the Commission's administration of this section. *With the growing utilization of natural gas it is not unlikely that the number of applications for certificates under Section 7(c) will increase.* [Emphasis added.]

able gas supplies. *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591, 613, fn. 23. As the report states (p. 78):

> It should be noted that the Commission's jurisdiction over proposed new pipe-line construction is limited to those cases in which the new line will enter the market area already being served by another natural-gas company. This limitation has serious disadvantages in terms of the general purposes of the Natural Gas Act. In the first place, as there is no precise definition of the market area of another natural-gas company, the Commission must decide in each instance whether or not it has jurisdiction. In the second place, it prevents any serious effort to control the unplanned construction of natural-gas pipe lines with a view to conserving one of the country's valuable but exhaustible energy resources.

In support of this recommendation, the Commission in 1941 drafted an amendment to Section 7, which was introduced into the First Session of the 77th Congress as H.R. 5249.[29] In hearings on this bill before the House Committee on Interstate and Foreign Commerce in July 1941, Chairman Manly, on behalf of the Power Commission, after outlining the difficulties the Commission had experienced in

[29] The bill was originally introduced as H.R. 4819, which was revised and resubmitted as H.R. 5249. H.R. 5249 was prepared in cooperation with the National Association of Railroad Utilities Commissioners as well as other interested groups. Hearings, *supra*, pp. 3, 38, 50. The amendment, insofar as here pertinent, was enacted substantially in the form presented by the Commission. See H. Rept. 1290, 77th Cong., 1st Sess. pp. 1–6.

applying the existing Section 7(c), pointed out that pipelines had also encountered difficulties in financing service extensions and other new facilities because of the limited scope of Section 7(c) (Hearings, *supra*, p. 3):

> * * * It may perhaps have been the thought of Congress that certificates would not be applied for except in those cases where communities now actually being served by a natural-gas company were proposed to be served by a new competing company. In practice, however, it has been found that the promoters and builders of pipe lines find it necessary or desirable either to have certificates from the Commission or to have an official determination that a certificate is not required. This is especially true where the proposed pipe line is to be financed by the sale of securities to the investing public or to financial institutions. This usually involves a long and tedious proceedings to determine jurisdiction even before the merits of the case are considered.

Later in his statement, Chairman Manly made it clear, in commenting on the derivation of the proposed amendment from Part II of the Commerce Act, that rates were only one of a number of factors that the Commission was required to consider before certificating gas services (*id.* at 5–6):

> In that connection, Mr. Chairman, I think it is very desirable to point out this fact, that even though under the existing section a proposed pipe line may not be under the jurisdiction of the Commission, under this certification section, during the period of its financing and construc-

tion, it does become subject to the jurisdiction of the Commission the minute it begins to operate and transport and sell natural gas, so that you are confronted with the situation under the present section that during the most important period in relation to a company—namely, the period in which it is being promoted, in which it is being financed, in which it is being constructed—the Commission may have no jurisdiction whatsoever and be confronted the day it begins operation with a financial structure or with a route which may have been highly undesirable from the standpoint of the public interest.

* * * * *

This amendment will not only eliminate the long and expensive investigations which have hitherto been necessary to determine the Commission's jurisdiction but will, we believe, have the effect of promoting the development of the natural-gas industry along lines which will be consistent with the public interest.

I wish to emphasize what seems to me to be the most important aspect of the proposed amendment from the standpoint of the public interest. *It will have the effect, in our opinion, of giving the Commission an opportunity to scrutinize the financial set-up, the adequacy of the gas reserves, the feasibility of the proposed services, and the characteristics of the rate structure at a time when such vital matters can be revised and modified as the public interest demands.* Without this authority the Commission is too often confronted with a situation in which it must either accept conditions which appear to be undesirable from the public stand-

> point or take the alternative course of subsequently requiring changes which may have much more serious consequences than would have been the case if such changes had been effected before the public was invited to invest in the new enterprise. [Emphasis added.]

Chairman Manly was then asked whether the Commission had considered it mandatory under the original Section 7(c) to give paramount weight to lower consumer rates in issuing new service authorizations. The Chairman, in response to a question by Congressman Boren, emphasized that the Commission did not consider the level of rates to be paid by the ultimate consumer the sole criterion under the original Section 7(c), and that a certificate might be denied by the Commission even where it would result in lower rates (*id.* at 18–19):

> Mr. BOREN. I want to ask if this amendment, in your judgment, in anywise changes section (c) of the original act in which, at least, it is my opinion, that the committee had the definite intention of making it a mandate to the Commission to issue a certificate where a company could definitely show that it could provide the services of natural gas at a cheaper cost to the ultimate consumer.
>
> Commissioner MANLY. I do not think so, sir. I think that is specifically reserved in paragraph (g); but it is not made mandatory, not spelled out, for the reason that *it is not the only criterion that can be set up.* [Emphasis added.]

Chairman Manly was then asked whether the Commission could give consideration to the public need for

expanded gas service in considering certificate applications (*id.* at 23–24):

> Mr. SOUTH. As a practical matter, the authority given to the Commission here could be used—and I am wondering if it is generally used—for the purpose of broadening or extending the application in such a way as to better serve the public interest.
>
> Commissioner MANLY. This has been the case, I am sure, in the administration of all of the cases that have come before this Commission. * * *
>
> * * * * * *
>
> Take, for example, this certain case involving the so-called Nevada case, the case of the Nevada Transit Co., which originally proposed to build a line into Arkansas, I believe it was, for the purpose of furnishing gas to some cement mills down there at materially lower rates than were being charged by the company furnishing the service.
>
> The Commission, after extended hearings and so forth, authorized the issuance of the certificate but required as a condition for the issuance of the certificate that the company should agree to serve those communities lying along the route of the proposed pipe line that they were going to build. They had not applied for the right to serve those communities, but the Commission felt that for the proper protection of the public they should be required to do so.

It is clear, therefore, that the Commission did not consider rates to be the exclusive criterion under either the original or the proposed Section 7(c); that Congress was made aware that the Commission had

treated and would continue to treat the public need for gas as an element of the "public convenience and necessity" under the proposed amendment; and that rate levels were only one of a number of factors which could be considered in authorizing new or expanded gas services. Following Chairman Manly's testimony as to the Commission's understanding and practice, Congress enacted the present Section 7(c) which contains the conventional "public convenience and necessity" standard.

Thus, although the hearings on H.R. 5249 (the 1942 bill) demonstrate that rates were regarded as one element which could be considered by the Commission in Section 7(c) proceedings, they also show the complete absence of any Congressional intention to limit the Commission's discretion by requiring it to give paramount consideration to rates at the expense of other elements of the public convenience and necessity.

Further evidence for this conclusion is found in the fact that, during the hearings on H.R. 5249, one of the majority members of the House Committee, Congressman Boren of Oklahoma, had favored an express limitation on the Commission's powers to condition the grant of service authorizations. Following his statement earlier in the hearing (*supra,* p. 63) that the Commission should give mandatory weight to the reduction of consumer rates in its service authorizations, Congressman Boren proposed that the Commission's discretion under Section 7(e) should be limited to the imposition of "conditions affecting rates, services, and things of that nature" (Hearings, at 24–25):

Mr. BOREN. I have no objection at all to the Commission having power to exact conditions such as you outline. My objection is not to the power exercised under those conditions, but to the language of the bill which does not limit you in the sort of conditions you should exact. I do not mean by that to infer any lack of confidence in the Commission, because I do not mean it that way at all; but I do mean as a general principle, I think we are going too far in giving just general grants of arbitrary power to bureaus and commissions and the executive branch in general, and I would like to see some limiting language there. As to this condition you mentioned, I think you should have that power; but then there should be some restrictions on what conditions could be exacted; whether the provision itself is a sufficient guarantee or not.

Commissioner MANLY. Yes. I am quite sure the Commission will have no objection to the inclusion of language which will indicate or limit the power to relevant, material, reasonable terms and conditions, which is further limited, you see, by the requirement that the public interest and necessity should require such conditions.

Mr. BOREN. *We can limit those conditions to conditions affecting rates, services, and things of that nature.*

Commissioner MANLY. *I would ask that you do not attempt to specify, because when you specify, you can never anticipate all of the situations that are going to arise. In fact, you usually do not anticipate the ones that customarily arise, and under the rules of construc-*

tion, if you specify them, you have limited the type of conditions that can be attached. If you make it reasonable, relevant, and material, so that the party has a right to go into court if the Commission attempts to get tyrannical or arbitrary, fine; but when you try to spell out the terms and conditions, you do make it awfully hard to administer. [Emphasis added.]

Significantly, no limitation on the discretion of the Commission to condition service authorization was included in Section 7 as re-enacted in 1942.

The Committee reports on H.R. 5249 strengthen our conclusion. The House Report (H. Rept. 1290, 77th Cong. 1st Sess., pp. 2–3) states in commenting on the need for the proposed amendments:

> Section 7(c) of the Natural Gas Act, as at present in force, has proved unsatisfactory not only from the standpoint of administration by the Commission, but also the natural-gas companies themselves, as well as to the producers of competing fuels and the operators of competitive methods of transportation whose economic interests may be affected by the construction or extension of natural-gas pipe lines. * * *
>
> * * * By the unregulated construction of a pipe line, uneconomic construction, or inflated costs may make proper regulation of operation thereafter difficult or practically impossible. *The bill when enacted will have the effect of giving the Commission an opportunity to scrutinize the financial set-up, the adequacy of the gas reserves, the feasibility and adequacy of the proposed services, and the characteristics of the rate structure in connection with* the pro-

posed construction or extension at a time when such vital matters can readily be modified as the public interest may demand. * * * [Emphasis added.]

Similarly, the Senate Report on the same bill (S. Rept. 948, 77th Cong. 2d Sess., pp. 1–2) states:

> Provisions of the Natural Gas Act empower the Commission to prevent uneconomic extensions and wastes, but it can so regulate such powers only when the extension is to "a market in which natural gas is already being served by another natural-gas company." Thus the possibilities of waste, uneconomic and uncontrolled extensions are multiple and tremendous. The present bill would correct this glaring inadequacy of the act. *It would also authorize the Commission to examine costs, finances, necessity, feasibility, and adequacy of proposed services. The characteristics of their rate structure could be studied.* Obviously these are powers that Federal Power Commission should have and should exercise in the public interest. [Emphasis added.]

It is evident, therefore, that the Section 4–Section 5(a) standard of "just and reasonable" was not intended to be applied mechanically to Section 7(e) proceedings, and that the "characteristic of the rate structure" is only one of a number of elements which the Commission was supposed to consider in authorizing new gas services, the necessity or need for the service also being given prominence. In fact, the emphasis was placed by Congress on elements of the proposed service which once having been determined could not thereafter be changed or remedied without

major economic loss and dislocation. Rates—the reasonableness of proposed rates to particular customers, in contra-distinction to the over-all structure of rates proposed by the company—could always be adjusted in subsequent Section 5(a) proceedings. Individual rates, unlike other aspects of public convenience and necessity, are the one element over which it is practicable for the Commission to exercise continued surveillance. Hence, it is entirely consistent with the purpose of the amended Section 7 to defer time-consuming consideration of the proposed rates themselves to subsequent proceedings in order to permit adequate exploration of other elements of the public convenience and necessity. See *infra*, pp. 84–100.

In sum, the history of Section 7 shows unmistakably that rates were only one of several elements which *could* be considered by the Commission in passing upon the "public convenience and necessity" under that Section.

C. OTHER FEDERAL REGULATORY AGENCIES INTERPRETING PARALLEL STATUTES HAVE UNIFORMLY REFUSED TO MAKE RATE FINDINGS IN CERTIFICATE PROCEEDINGS

It has been the uniform practice of every federal regulatory agency operating under a statute parallel or similar to the Gas Act to defer consideration of the reasonableness of proposed initial rates until subsequent formal rate proceedings.

1. *Motor Carrier Act.* The Interstate Commerce Commission, as this Court noted in *Schaffer Transportation Co.* v. *United States*, 355 U.S. 83, 91–92, in interpreting the statute from which Section 7(e) of the Gas Act directly derives, has consistently refused to pass upon the reasonableness of proposed

motor carrier rates in certificating new motor carrier services under Section 207(a) (49 U.S.C. 307(a)) of the Commerce Act.[29a]

Section 216(d) of that Act (49 U.S.C. 316(d)) parallels Section 4(a) of the Gas Act in providing that:

> All charges made for any service rendered or to be rendered by any common carrier by motor vehicle engaged in interstate or foreign commerce in the transportation of passengers or property as aforesaid or in connection therewith shall be just and reasonable, and every unjust and unreasonable charge for such service or any part thereof, is prohibited and declared to be unlawful. * * *

Section 207(a) governing certification of motor carrier services by the Commerce Commission is virtually identical with Section 7(e), which directly derives from it.[30] Section 207(a) provides that:

> a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provi-

[29a] The apparent absence of decisions passing on rates in certificate proceedings under Part I of the Interstate Commerce Act (Section 1(18)) indicates a similar practice in certificating rail services.

[30] "The proposed amendment to section 7 follows, in general, the legislative scheme of the sections of the Motor Carrier Act of 1935 governing certificates of public convenience and necessity." Hearings before the House Committee on Interstate and Foreign Commerce on H.R. 5249, Report of Federal Power Commission, 77th Cong., 1st Sess., p. 82; *id.* at pp. 5, 20; H. Rept. No. 1290, 77th Cong., 1st Sess., p. 2.

> sions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied * * *.

This Court has recognized the broad discretion granted by the language of Section 207(a). *Interstate Commerce Commission* v. *Parker,* 326 U.S. 60, 65:

> Public convenience and necessity is not defined by the statute. The nouns in the phrase possess connotations which have evolved from the half-century experience of government in the regulation of transportation. When Congress in 1935 amended the Interstate Commerce Act by adding the Motor Carrier Act, it chose the same words to state the condition for new motor lines which had been employed for similar purposes for railroads in the same act since the Transportation Act of 1920, § 402 (18) and (20), 41 Stat. 477. Such use indicated a continuation of the administrative and judicial interpretation of the language. Cf. *Case* v. *Los Angeles Lumber Co.,* 308 U.S. 106, 115. The Commission had assumed, as its duty under these earlier subsections, the finding of facts and the exercise of its judgment to determine public convenience and necessity. This Court approved this construction. *Chesapeake & Ohio R. Co.* v. *United States,* 283 U.S. 35, 42. Cf. *Gray* v. *Powell,* 314 U.S. 402, 411–412. The purpose of Congress was to leave to the Commission authoritatively to decide whether additional motor service would serve public con-

> venience and necessity. Cf. *Powell* v. *United States,* 300 U.S. 276, 287. This, of course, gives administrative discretion to the Commission, cf. *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 87–88, to draw its conclusion from the infinite variety of circumstances which may occur in specific instances. * * *

This broad construction by the Court of language which is identical with and the source of Section 7(e) cannot be reconciled with respondents' contention that public convenience and necessity is limited in every case to the consumer's interest in lower gas rates.

In exercising its discretion under Section 207(a) of the Motor Carrier Act, the Commerce Commission, despite repeated attacks by competitors and shippers on the reasonableness of rates proposed by motor carrier certificate applicants, has consistently refused to pass upon rates in certificating motor carrier services, holding that that issue could be explored in subsequent proceedings under Section 216(e) of the Commerce Act (49 U.S.C. 316(e)), the precise equivalent of Section 5(a) of the Gas Act. *Omaha & Council Bluffs Ry. & Bridge Co.,* 52 M.C.C. 207, 234–235; *Joseph Pomprowitz,* 51 M.C.C. 343, 350; *D. A. Beard Truck Lines Co.,* 34 M.C.C. 3985, 415; *Fred Lindeman,* 29 M.C.C. 183, 185; *Becker Transportation Co.,* 26 M.C.C. 487, 497; *A. D. Paddison,* 21 M.C.C. 324, 327.[31] The Commerce Commission has justified

[31] The fact that the Commerce Commission, unlike the Power Commission under the Gas Act, can suspend initial rates as well as rate changes under Section 216(g) of the Commerce Act (49 U.S.C. 316(g)), underlines the fact that Congress did not intend in the Gas Act to require Commission predetermination of wholesale gas rates. Although both initial motor carrier rate filings and rate changes are suspendible, such rates

this policy as follows in *Omaha & Council Bluffs Ry., supra:*

> * * * Transit argues that the level of fares to be charged by the Street Car Company is one of the most substantial facts affecting the public interest that is involved in these proceedings, and that if the national transportation policy has any meaning, the matter of economical service as between rival applicants is as important as the determination of the question of whether a need exists for the service * * *.
>
> * * * * * *
>
> We have consistently refused to consider the issue of rates as pertinent in proceedings of this nature, since that is a matter for which other provisions of the act provide a remedy. Accordingly, whether or not the present or future level of rates charged by either applicant is on a proper basis is a matter that cannot properly be considered herein, and certainly could not be determined on the present record. If not otherwise so, the reason becomes obvious from the arguments Transit itself presents which demonstrate the complexity of the subject of rates and the correctness of our view that the issues involved therein are such that they should not be confused with those involved in application proceedings.

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go into effect automatically at the end of the seven month suspension period without any provision for a refund. It follows that the motor carrier rate provisions in Part II of the Commerce Act offer substantially less protection to the shipper than the co-ordinate Gas Act provisions to the gas consumer; but the Commerce Commission has consistently refused to apply the "just and reasonable" standard in motor carrier certificate proceedings. It follows *a fortiori* that it need not be applied in natural gas proceedings.

Since the language of the two Acts is virtually identical and, as we have said, the Gas Act provision was directly derived from Part II of the Commerce Act (*supra*, p. 70, fn. 30; cf. *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575, 584; *Hope Natural Gas Co.* v. *Federal Power Commission*, 196 F. 2d 803, 806–807 (C.A. 4)), respondents must necessarily meet the burden of showing that Congress in adopting the Section 207(a) language in the Gas Act did not also adopt the Commerce Commission's interpretation of that language which was then fully developed (see *Becker Transportation Co.*, 26 M.C.C. 487, 497 (1940); *A. D. Paddison*, 21 M.C.C. 324, 327 (1940); *Petroleum Carrier Corp.*, 21 M.C.C. 124, 125 (1939); *Baggett Transportation Co.*, 19 M.C.C. 609, 612 (1939)). It is established, of course, that Congressional adoption of prior statutory language carries with it the prevailing interpretation of that language unless the express contrary is shown by the legislative history of the subsequent enactment. *Interstate Commerce Commission* v. *Parker*, 326 U.S. 60, 65; *United States* v. *Ryan*, 284 U.S. 167, 175; *Armstrong Paint & Varnish Works* v. *Nu-Enamel Corp.*, 305 U.S. 315, 332; *United States* v. *C.I.O.*, 335 U.S. 106, 112–113.

It follows that the long continued interpretation and practice of the Commerce Commission fully supports the legality of the Power Commission's practice of generally deferring appraisal of producer rate levels to Section 5(a) proceedings.[32]

[32] As we have shown, there is nothing in the legislative history of the Gas Act which contravenes this conclusion. The

2. *Water Carrier Act.* The Commerce Commission has also refused to consider rate issues in passing upon water carrier certificate applications under Section 309(c) of the Commerce Act (49 U.S.C. 909(c)), despite the requirement in Section 305(a) of that Act (49 U.S.C. 905(a)), paralleling Section 4(a) of the Gas Act, that all water carrier rates must be just and reasonable.

The scope of the Commission's discretion under Section 309(c) was described by this Court in *United States* v. *Detroit & Cleveland Navigation Co.*, 326 U.S. 236, 241:

> The Commission is the guardian of the public interest in determining whether certificates of convenience and necessity shall be granted. For the performance of that function the Commission has been entrusted with a wide range of discretionary authority. *Interstate Commerce*

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framers of the Act, as originally adopted, intended that the Commission, except in exceptional cases, should regulate gas rates only after they were placed in effect by company agreement. The legislative history of the amended Section 7 (*supra*, pp. 57–69) also shows that Congress did not intend to limit the exercise of the Commission's discretion in granting certificates under Section 7(e) but, to the contrary, contemplated that the Commission would be free to consider and balance all the usual elements affecting the public convenience and necessity, including the public need for the service. There is nothing in the history of Section 7 which shows that Congress intended the Commission to pre-determine natural gas initial prices. The testimony by the Commission's Chairman, *supra*, pp. 63–67, shows affirmatively that price was only one of several factors which could be considered by the Commission in passing upon the public convenience and necessity, and that the "just and reasonable" standard was not a mandatory test under Section 7(e).

> *Commission* v. *Parker*, 326 U.S. 60. Its function is not only to appraise the facts and to draw inferences from them but also to bring to bear upon the problem an expert judgment and to determine from its analysis of the total situation on which side of the controversy the public interest lies. * * *

The pertinent language of Section 309(c), the water carrier certificate provision, is identical with Section 7(e); yet the Commerce Commission, as noted, has always refused to consider water carrier rates in certificate proceedings, holding that "the rates which an applicant may charge are not determinative of its right to a certificate." *Coast Transportation Co.*, 250 I.C.C. 469, 471.[33]

3. *Civil Aeronautics Act.* The Civil Aeronautics Board, another federal agency with rate jurisdiction equivalent to that of the I.C.C. and the F.P.C., whose experience is instructive, has similarly declined to consider the question of rates in air carrier certificate proceedings in Section 401 of the Civil Aeronautics Act of 1938 (49 U.S.C. 481) (which paralleled exactly Section 7(e)) despite the express Congressional mandate in Section 404 of that Act (49 U.S.C. 484) that an air carrier must "establish, observe, and enforce just and reasonable individual and joint rates." *Delta Air Lines*, 14 C.A.B. 1149, 1163; cf. *United Air Lines, Inc.* v. *Civil Aeronautics Board*, 155

[33] The Commission has also applied the same rule in freight forwarder certificate proceedings under Part IV of the Commerce Act (49 U.S.C. 1004, 1010). *R.T.C. Terminal Corp.*, 265 I.C.C. 527, 532; *Your Freight Forwarder, Inc.*, 285 I.C.C. 425, 431.

F. 2d 169, 174–176 (C.A.D.C.); *National Airlines, Inc.*, 14 C.A.B. 331, 347–350; *General Passenger-Fare Investigation*, 17 C.A.B. 230, 232–235; *West Coast Common Fares Case*, 15 C.A.B. 90, 93.[34]

4. *The Federal Communications Act.* Although there seem to be no reported decisions relating to the question, we have been reliably informed that the Communications Commission has never in any case investigated the reasonableness of proposed rates in telephone and telegraph certificate proceedings under Section 214 of the Communications Act (47 U.S.C. 214), despite provisions in Sections 202–205 of that Act (47 U.S.C. 202–205) exactly paralleling Sections 4(a) and 7(e) of the Gas Act.

In summary, the language and structure of the Gas Act, the Act's purpose and legislative history, and the long-standing construction of parallel statutes by the Commerce Commission, the C.A.B., and the F.C.C. point to the twin conclusions: the rates initiating gas sales (at wholesale) need not be pre-determined by the Federal Power Commission but may be set by the parties in the first instance subject to the Commission's powers of review under Section 4(e) and 5(a) of the Act, and that "public convenience and necessity" (not "justness and reasonableness") is the controlling standard under Section 7(e).

[34] It should be noted that, while the Civil Aeronautics Board has rate suspension powers equivalent to those in Section 4(e) of the Gas Act, it is expressly forbidden to suspend initial rates (49 U.S.C. 642(g)). The cited provisions of the Civil Aeronautics Act have been re-enacted in the Federal Aviation Act of 1958 (Act of August 23, 1958, Secs. 401, 404, 1002(g), 72 Stat. 754, 760, 788).

D. OUR POSITION IS SUPPORTED BY TWO DECISIONS OF THE DISTRICT OF COLUMBIA CIRCUIT

The District of Columbia Circuit, the only court thus far to pass on the issue, has held in *Oklahoma Natural Gas Co.* v. *Federal Power Commission*, 257 F. 2d 634, No. 288, this Term, dismissed on February 20, 1959, and *Florida Economic Advisory Council* v. *Federal Power Commission*, 251 F. 2d 643, certiorari denied, 356 U.S. 959, that the Commission need not make formal rate determinations before certificating new gas services.

The *Oklahoma Natural* proceeding involved competing applications under Section 7(e) of the Natural Gas Act by two pipeline systems to supply gas for consumption in Chicago and surrounding areas. Under one proposal, a part of the additional gas supply was to be obtained from sales by independent producers from acreage in Northern Texas. Oklahoma Natural Gas Company, a gas distributor operating entirely within Oklahoma, intervened in the consolidated applications contending that these sales should not be certificated at the proposed price on the ground that this would cause an increase in the price of gas which it purchased within Oklahoma. The Commission refused to require the producers to accept the prevailing price in Oklahoma as a condition to obtaining a certificate (R. 300–394, 512–543, No. 288, this Term), finding that the proposed price for the Texas sales would not trigger an increase in Oklahoma, and that it was not inconsistent with the public convenience and necessity. Oklahoma Natural sought review of the certificate order in the District of Colum-

bia Circuit, urging that the Commission was required to find that the price proposed in every Section 7(e) proceeding was just and reasonable, at least where the price was contested. The Court of Appeals (Danaher and Bastian, *JJ.*, with Bazelon, *J.* dissenting), upheld the Commission on the ground that the Gas Act did not impose any such mandatory requirement, stating (257 F. 2d at 640):

> Petitioner contends that in a certificate proceeding under § 7(e), where the price being paid by a producer is above that then being paid by others in the specific area, the Commission must either impose a price condition or determine the justness and reasonableness of the price, as in a proceeding under §§ 4 and 5, 15 U.S.C.A. §§ 717c, 717d. In other words, it is contended that the Commission, in such a situation, has no discretion but must take one of the two courses. We think not. Section 4(a) states the substantive objective of the Act, that rates be reasonable; it does not specify the procedure by which this objective is to be attained. That procedure is prescribed by §§ 4 (d), 4(e) and 5(a). The Commission cannot be required to convert every certificate proceeding into a rate proceeding.

The court also held that the Commission did not abuse its discretion in finding that the public convenience and necessity required the sales at the proposed price (257 F. 2d at 640–641):

> It is obvious that the plain congressional meaning is to vest the Commission with the discretion to attach terms, including rate conditions. It is fitting that there should be this

> discretion and, in the absence of an abuse of that discretion, courts should not interfere. We find no such abuse here.
>
> * * * * *
>
> We are unable to state that the facts developed at the hearings do not support the Commission's findings and conclusions.

The court in *Oklahoma Natural* relied on an earlier holding of another panel of the same court (Bazelon, Fahy, and Burger, J.J.) in *Florida Economic Advisory Council* v. *Federal Power Commission,* 251 F. 2d 643, certiorari denied, 356 U.S. 959 (Bazelon, J., dissenting there, likewise), sustaining a Commission order certificating a natural gas pipe line transporting gas to markets in Florida. A principal contention of interveners in that proceeding, renewed before the Court of Appeals (251 F. 2d at 646, 654) and this Court (petition for certiorari, No. 911, Oct. Term, 1957, pp. 29–31), was that the Commission, prior to certificating the service, should have held a hearing to determine the reasonableness of rates which the proposed pipe line would pay for gas from its producer suppliers. The District of Columbia Circuit stated, in rejecting this contention (251 F. 2d at 646):

> *Suppliers' Rates.* Petitioner claims the Commission should have held a rate hearing to determine the lawfulness of the rates to be charged by the gas suppliers. But this inquiry may be resolved in a rate proceeding rather than in a proceeding for a certificate of public convenience and necessity, and the Commission did not abuse its discretion in declining to consider the matter in the instant proceeding. The

> rates are subject to the Commission's continuing jurisdiction, and, whenever sufficient reason appears, they may be taken up. * * * [35]

The District of Columbia Circuit has twice held, therefore, that the Section 4–5(a) standard cannot be read into Section 7(e), and that Congress has not imposed a requirement that the Commission pre-determine natural gas prices, by appraising proposed rates in the light of the "just and reasonable" standard.

V

THE COMMISSION HAS NOT ABUSED ITS DISCRETION IN REFUSING TO PRE-DETERMINE INITIAL PRODUCER RATES

We have shown thus far that Congress contemplated that gas wholesale prices would be set in the first instance by natural gas companies in an industry which was intended to retain a basis in private contract. Since the Commission was given continuing authority over the prices adopted by the companies under Sections 4 and 5(a), this was thought sufficient to protect the consumer against discriminatory or excessive rates without entirely eliminating private price agreements. Respondents may argue, however,

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[35] Judge Bazelon, dissenting in *Oklahoma Natural*, sought to distinguish this statement as *dictum* (251 F. 2d at 654) on the ground that the petitioner in that case had not claimed that the producer rates were in fact unlawful. The same can be said as to *Oklahoma Natural*, however. The basic attack against the Commission's procedure in both cases was not that the proposed rates were patently unlawful but that it was unclear from the record whether they were lawful, and for that reason a rate hearing must be held prior to certification (compare petitioner's brief, No. 13,833, C.A.D.C. pp. 38–40, with petition for certiorari, No. 288, this Term, p. 22).

that assuming such a scheme was adopted by Congress, experience has shown that complete Commission control over initial producer prices is necessary for consumer protection; and that this being the case, the Commission, in applying the public convenience and necessity standard, has abused its discretion in not making formal rate determinations or imposing specified or contingent prices in all contested producer certificate proceedings, as it has in certain pipe line and producer certificate proceedings.

We have seen, however, that the scheme of gas regulation adopted by Congress does not contemplate that the Commission will entirely take over the task of setting initial rates for the industry, and that Congress intended that rate regulation under Sections 4(e) and 5(a) would provide an effective mechanism for consumer protection against unreasonable prices. It follows that the Commission's refusal in many instances to pre-determine producer prices is entirely consistent with the basic purposes of statute and does not, standing alone, constitute an abuse of discretion in determining the public convenience and necessity in new producer sales. *Schaffer Transportation Co.* v. *United States,* 355 U.S. 83, 88; *American Trucking Associations* v. *United States,* 355 U.S. 141, 149–150.

Where as here the Commission's general regulatory policies and program are consistent with the statutory purpose, Congress as we have shown, *supra,* pp. 32–81, has endowed the Commission with broad discretion to determine in particular cases the extent of the enquiry it will make into rates proposed

by certificate applicants. As this Court has said in reviewing Commerce Commission findings under a provision which was the model for Section 7(e) (Section 207(a) of the Motor Carrier Act, *supra*, pp. 70–71; *United States* v. *Pierce Auto Freight Lines*, 327 U.S. 515, 535–536):

> We think the court misconceived not only the effects of the Commission's action in these cases but also its own function. It is not true, as the opinion stated, that "* * * the courts must in a litigated case, be the arbiters of the paramount public interest." This is rather the business of the Commission, made such by the very terms of the statute. The function of the reviewing court is much more restricted. It is limited to ascertaining whether there is warrant in the law and the facts for what the Commission has done. Unless in some specific respect there has been prejudicial departure from requirements of the law or abuse of the Commission's discretion, the reviewing court is without authority to intervene. It cannot substitute its own view concerning what should be done, whether with reference to competitive considerations or others, for the Commission's judgment upon matters committed to its determination, if that has support in the record and the applicable law.

We shall show in this part that the Commission has not abused its discretion in refusing in many cases to impose rate conditions, since a program of pre-determining initial producer prices in all contested cases would be undesirable and impracticable at this stage of producer regulation. We shall also

show that the Commission's policy of authorizing sales by independent producers following the *Phillips* decision has been consistent not only with the policies of the Act but with the public interest in general, including the immediate and long range interests of the existing consumers of natural gas.

A. THE COMMISSION COULD NOT HAVE EFFECTIVELY PRE-DETERMINED INITIAL PRODUCER RATES AT THIS STAGE OF PRODUCER REGULATION

1. As a result of the *Phillips* decision in 1954 a distinctly different segment of the industry has been brought for the first time under active federal regulation. The gas production industry differs in important respects from the gas transportation or pipeline industry, so that much of the Commission's experience prior to *Phillips* could not be applied directly to the independent producers. Hence, as the Commission has moved forward with a program of producer regulation, it has been confronted with a number of immediate problems analogous but not wholly similar to those met by the Commission at the outset of pipeline regulation.

Although regulation of the interstate pipelines was delayed during World War II, the Commission by the end of the war had been able to develop a formula and method for appraising pipeline rates, which had been tested and approved by this Court in *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575; *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591; and *Colorado Interstate Gas Co.* v. *Federal Power Commission*, 324 U.S. 581. It was therefore in a position, following the war, to

apply this formula in the system-wide Section 5(a) proceedings appraising the reasonableness of pipeline rates, and in isolated cases where required by the public interest (*infra,* pp. 86–88) in examining the reasonableness of rates in proceedings granting pipeline certificates.

The Commission recognized from the beginning of gas regulation that the design of a pipeline rate structure is an important element of the public convenience and necessity, to be evaluated in passing on a new service application. Since pipelines usually are natural monopolies *vis a vis* their existing customers who have invested in facilities for the use of gas, and their rate structures are developed for the most part unilaterally (see *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Division,* 358 U.S. 103), pipeline rates present possibilities of discrimination or over-reaching which were not presented by production or distribution of natural gas.

In addition, the rate structures for proposed pipeline extensions or new systems, unlike producer rates, are invariably complex, multi-volumed documents based on many inter-related factors which make it extremely difficult for the Commission to require major adjustments after the schedules have been placed in effect.[36]

[36] Although the Commission has continuing regulatory jurisdiction over pipeline rate structures, the adjustment of such structures once they have been placed in effect presents many difficulties which are aggravated by the fact that pipelines in most cases sell to numerous buyers. Revision of cost allocation formulas to eliminate discrimination, for example, may require drastic and unexpected readjustments in other areas of a pipe-

The Commission has also been required to scrutinize proposed pipeline rates in order to be able to determine the economic feasibility of proposed pipeline projects, since it is impossible, practically speaking, to remedy a basically uneconomic pipeline once the physical facilities have been constructed, and the consumers may have to bear the burden of such a line indefinitely. Producer certificate applications, in contrast, are filed only after the wells have been drilled and gathering and related facilities constructed, so that no questions of economic feasibility can arise.

The Commission, primarily for these reasons, has required pipeline certificate applicants to present data supporting their proposed rate structure (Gas Regulations, Section 157.14(a)(18), 18 C.F.R. 157.14(a)(18)), and scrutinizes such proposed rate structures for possible discrimination, with close attention to cost classifications and allocations and the form of the proposed rate (*i.e.*, demand-~~community~~ commodity, cost of service, etc.). In appraising proposed pipeline rate structures, the Commission also examines the level of the rate in the light of cost data provided by the applicant; where the proposed rate appears excessive in the light of this evidence and past Commission experience, the Commission will often require submission of additional cost data. In 29 pipeline proceedings (approximately 1.9% of pipeline applications involving service extensions passed upon by the Com-

line's business. Producer rates, in contrast, are readily adjusted since they normally involve only a single sale transaction to a single buyer.

mission between 1949 and 1957, inclusive)[37] the Commission has required as a condition to granting the certificate that the applicant file, either immediately or at some future time, a rate schedule which differed (or might differ) from that submitted with its original proposal. These rate conditions have taken a variety of forms, including specification of a particular rate to be filed, or the filing of an interim or contingent rate.[38]

[37] During these years, the Commission certificated in excess of 1,560 separate pipeline extensions. Rate conditions requiring actual or potential acceptance of a rate other than that agreed to by the parties were imposed in only 29 of these proceedings. A number of the remaining proceedings involved individual sales from existing facilities which were certificated on the condition that the sale be governed by the pipeline's existing rate schedule covering the area and type of service in question. However, there was no rate controversy in these cases since there was no underlying contract providing a different rate, inasmuch as the parties contemplated that their sale would be subject to the pipeline's tariff. (These routine conditions are included in the enumerated rate conditions reported in F.P.C. Annual Reports, 1951, p. 110; 1952, p. 111; 1953, p. 112; and 1954, p. 128.)

[38] The various types of conditions are summarized in the Commission's Report for the fiscal year 1952 (pp. 110–111):

> It is the policy of the Commission, whenever possible, to reach agreement on the various rate problems arising in connection with certificate applications prior to or during the hearings on such applications. When this cannot be done, it is necessary to condition the certificates issued in such proceedings, to require the filing of proper rates sometime in the future. Such rate conditions are in one of four general forms, depending upon the particulars of the case involved. First, the applicant may be required to file a definite and specific rate; i.e., the proper rate is spelled out in dollars and cents. Second, the condition may require the filing of rates satisfactory to the Commission, shortly before commencement of the proposed service. This al-

In the overwhelming majority of pipeline certificate cases, the Commission has authorized the extension or new service under the pipeline's rate schedule or the rate proposed by the applicant and its customers, as contemplated by the Gas Act (*supra,* pp. 32–81). In almost every such case, the rate placed in effect has later been reviewed prospectively for reasonableness in subsequent Section 4(e) proceedings resulting from rate increase applications.

2. When the Commission undertook to regulate independent-producer new service applications following *Phillips,* it discovered that the factors which had made it feasible and desirable for the Commission to enquire closely into certain pipeline initial rates were not presented by most independent producer certificate applications. *Tamborello,* 11 P.U.R. 3d 413, 417.

At the time when *Phillips* was decided in June 1954, the Commission was engaged in regulating approximately 100 gas pipeline companies which filed an average of 700 new or revised rate schedules, and between 150 and 200 applications for service extensions, annually. In August 1954, following *Phillips,* the Com-

lows the applicant to more accurately determine construction and operating costs and practices, and to determine proper rates by using this information. Third, the Commission may allow certain rates to become effective for an interim period of operation, with permanent rates to be filed on the basis of actual operating experience during the interim period. Fourth, a certificate authorizing deliveries to a new resale customer, by an existing pipeline system, may be conditioned to require that the sale be initiated under the pipeline company's applicable existing rate schedule. Such a condition eliminates the possibility of rate discrimination against new customers.

mission began to receive a large volume of producer certificate applications governing sales already being made on June 7, 1954, the date of the *Phillips* decision. Along with these applications, it also received a growing volume of producer applications seeking authorization for new sales at rates negotiated by the parties. By December 1954, when the final revision of Commission regulations specifically applicable to the over 4,000 independent producers was adopted (Order No. 174B, 18 CFR 154.91, *et seq.*), the Commission was confronted with 1,400 producer rate and certificate filings monthly, or a total of 16,800 applications, which had to be passed upon during the first year of producer regulation.

In addition to this greatly augmented regulatory responsibility, the Commission, as we have noted, was required to overcome many of the initial problems which it had faced at the beginning of pipeline regulation. The pipeline industry has many of the characteristics of a traditional public utility. Typically, individual interstate gas pipelines possess a relatively uniform capability for providing a dependable volume of service, the earnings from which will defray their relatively high initial capital costs (financed on a long term basis) and their substantial operating costs. All of these costs are relatively ascertainable and even predictable, and reasonable rates can be set by ascertaining whether, if applied to the volume of service rendered, they will produce revenues that will equal "costs of service" (including a fair return on the net capital investment).

The production of natural gas contrasts sharply. There is the widest range of capital investment and volume of production in relation to each other—depending on the success had in striking gas. Operating costs for the producing wells, after they have been brought in, are relatively low or even nominal. Any producer who is attempting to stay in business has another annual cost which bears no ascertainable relationship to a particular well or field. For there must be continual exploration and development of new gas reserves resulting in unsuccessful surveys and searches, dry wells, and small producing wells at a cost that constitutes a large fraction of the industry's total annual cost.

Such cost has little or no necessary relationship to the costs which can be shown for a particular well, field or geographical area of a given producer. Moreover, it is difficult if not impossible to ascertain the extent to which the fraction of such costs shown for a particular well, field, or area may correspond to the industry average. Thus a peculiarly baffling problem is presented of deciding what, if any, use can be made of "costs" of a particular well, field, or area in determining just and reasonable rates that will properly reflect this cost or provide the necessary incentive for continued exploration and development of new reserves.

Despite a major effort on the Commission's part to regulate the producers effectively and expeditiously under all provisions of the Gas Act, these marked economic differences in the two segments of the natural gas industry made it impossible, as we have

noted, to draw immediately on the Commission's past experience in attacking the problems of regulating producer rates. Since the gas production and the pipeline industries differ sharply in almost every important economic aspect, many of the formulas, rules, principles, and techniques developed for appraising pipeline rates were inapplicable to producer sales. Additionally, data on producer operations were entirely lacking, including producer costs and cost allocations, which are normally employed in the development of a rate formula. These difficulties were compounded by the impossibility (because of lack of appropriations) of suddenly augmenting the Commission's technical staff to deal with and pass upon the enormously increased volume of rate filings and service applications. The lack of service experience as to comparable sales, as well as the fundamental economic differences between the two industries, made it impossible for the Commission to develop immediately a workable formula for applying the "just and reasonable" standard to producer rates under Section 5(a) of the Act. See *City of Detroit* v. *Federal Power Commission*, 230 F. 2d 810 (C.A.D.C.), certiorari denied, 352 U.S. 829; *Bel Oil Corp.* v. *Federal Power Commission*, 255 F. 2d 548, 553 (C.A. 5), certiorari denied, 358 U.S. 804; and *Gulf Oil Corp.* v. *Federal Power Commission*, 255 F. 2d 556, 557 (C.A. 5).

In the absence of either service experience or a rate formula which would allow the fixing of reasonable rates in Section 5(a) proceedings, the Commission found it impossible to set a reasonable price for a proposed producer sale in Section 7(e) certificate proceed-

ings by relying on an existing rate formula, following its practice in certain pipeline certificate proceedings. There can be no doubt, therefore, that the Commission did not abuse its discretion in failing to pass upon the reasonableness of proposed producer initial rates prior to certificating producer sales, since it would have been impossible for it to have done so on any rational basis.

3. It might be argued that, assuming the reality of these obstacles, the Commission nonetheless should have made a general practice in contested producer cases of conditioning the grant of producer certificates on the acceptance of a specified rate, or a contingent rate, as it has in certain pipeline proceedings; and that it could thereby delay rate appraisals until such time as service experience was available and rate criteria had been developed. Specifically, it might be argued that the Commission should adopt as a general rule the procedure which it originally attempted to follow in this case, and require that every contested producer initial rate be set at some determined level and then allow the producer to file any increase provided by its contract over this level, which would then be suspended and placed in effect subject to refund (see *supra*, p. 6).

It is true that the Commission has imposed rate conditions involving specified and contingent rates in a number of producer certificate proceedings where the circumstances presented a strong possibility of discrimination, triggering of general price rise in unregulated rates, or other unusual factors indicating that the sale should not be certificated absent the

condition."[39] There is no doubt as to its power to impose such conditions. *Tamborello*, 11 P.U.R. 3d 413, 415–417. We shall show, however, that the imposition of interim rates or other rate conditions as a general practice in producer certification would be contrary to the public interest at this point in producer regulation.

a. A preliminary difficulty with the general adoption of such a procedure is that the Commission at this point in producer regulation, often has no rational basis on which to determine the price which it would require the producer to accept in lieu of its contract price pending a rate hearing. There can be no doubt that the Commission may impose under Section 7(e) only reasonable conditions and conditions required by public convenience and necessity, so that, even assuming the propriety of initial price determinations, any rate imposed on a gas company as a condition to authorizing a sale would have to have some reasonable basis in the record before the Commission. Yet it is

[39] See *Cities Service Gas Co.*, 12 P.U.R. 3d 3, affirmed, *Signal Oil & Gas Co.* v. *Federal Power Commission*, 238 F. 2d 771 (C.A. 3), certiorari denied, 353 U.S. 923; compare *Tamborello*, 11 P.U.R. 3d 413. Approximately 4,860 initial producer rate filings have been received since the *Phillips* decision, of which only 140 have been contested. Most producer rate conditions have been imposed in granting temporary authorization to begin service under Section 7(c) of the Act (App., *infra*, p. 111). These conditions have required the applicant to agree to accept retroactively whatever rate the Commission may find required by the public convenience and necessity in subsequent permanent certificate proceedings. Approximately 50 conditions of this type have been imposed. See, e.g., *Sunray Mid-Continent Oil Co.*, Docket No. G–16134; *app. pdg.*, *Sunray Mid-Continent Oil Co.* v. *F.P.C.*, CA10, No. 6061; *Amerada Petroleum Co.*, Docket No. G–16029; *Shell Oil Co.*, Docket No. G–13878; and *Humble Oil & Refining Co.*, Docket No. G–17772.

precisely the absence of reliable evidence as to service experience which normally makes it impossible for the Commission to evaluate producer initial price proposals prior to certification. Many certificate rate controversies arise in proceedings involving sales from newly developed areas, as here, where there is a paucity of operating experience, and drilling and gathering costs are largely in the realm of conjecture. Any price which the Commission might attempt to impose pending review of the proposed rate would be based on conjecture or on other prices in the area, or prices paid by the same purchaser in other areas, which have not been appraised by the Commission and which might or might not bear some relation to the rate in question. *Seaboard Oil Co.*, 19 F.P.C. 416, 423.

The 17¢ per Mcf price which the Commission originally sought to have the producers accept in this proceeding (R. 528–529) was probably subject to this defect. Although this was the highest price which Tennessee Gas was then paying, the Commission had no way of determining whether that price was at all an appropriate rate for the Catco sale, so that the justification for requiring the parties to substitute that price for the contract price of 21.4¢ per Mcf, even for a limited period of time, would be obscure.[40]

[40] Adoption of the practice of imposing a price ceiling based on the purchaser's own highest previous price paid for gas would merely have the effect of awarding the gas to the pipeline that had previously paid the highest price, irrespective of comparative need for the gas. See R. 247a–251a.

Recognizing this fact, the Commission, in the proceedings here in question, coupled its 17¢ per Mcf rate proposal with the suggestion that the producers file for an immediate rate increase which would be allowed by the Commission to go into effect immediately, subject to refund. This order, had it been agreed to by the parties, would have resulted in a contingent rate pending the outcome of Section 4(e) proceedings on the rate increase, the respective parties being liable retroactively to charge and to pay the rate ultimately found reasonable by the Commission.

b. Whatever the merits of adopting such a procedure in this particular case, it would have been impossible, practically speaking, for the Commission to employ it as a general rule in dealing with contested producer initial rates at this stage of producer rate regulation. If every contested initial rate were to be placed in effect on a contingent basis, this would mean that neither party to a producer sale would know, possibly until years later, at what price they had contracted to buy and sell gas. For the reasons stated, *supra*, pp. 86–88, a pipeline, confronted with such a condition, can forecast with fair accuracy the *minimum* price which would ultimately be allowed by the Commission; but a producer, before undertaking development of new acreage, would have no way of anticipating, prior to drilling, what figure (or range of figures) would finally be selected by the Commission as a reasonable price for the gas. Since principles governing cost allocation, depreciation, tax treatment, and allowable rate of return applicable to producer sales had not and could not have been developed by

the Commission at the times here in question, a producer could not forecast the general area of the return it might hope to obtain if its exploration activities proved productive.

In sum, had the Commission uniformly required the producers and their customers to accept contingent rates for sales from newly developed areas (which are the source of most producer certificate rate controversies), producers prior to drilling in those areas would have had no adequate way of forecasting whether the allowable return would be adequate to meet their expenses, since they could not anticipate with any accuracy what those expenses would be or what the Commission would consider as legitimate. Since gas exploration or "wildcatting" is often financed on a short term basis, wildcatters (usually the medium-sized or smaller producer companies) might have been unable to obtain financing since they could have given no assurance of being able to market any gas they might find at a price commensurate with the risk of their over-all operations.

As a result, had the Commission followed the general practice of imposing contingent rates, the result almost certainly would have been a substantial reduction in natural gas exploration activities during the post-*Phillips* period, except in cases where a producer had an assured gas market which was not subject to the Commission's jurisdiction.[41] Since one

[41] Some additional gas reserves also might have been discovered as result of drilling for oil which is often produced in conjunction with gas. The fact that a contingent rate would not have been imposed in all cases would not have relieved the un-

purpose of the Gas Act plainly was not to stifle gas exploration and production, the Commission did not abuse its discretion in refusing to adopt a general policy of compelling the producers to accept contingent rates where their contract prices were questioned. *Hope Natural Gas Co.*, 19 F.P.C. 405, 408.

4. There is a further reason why it would have been impracticable, if not impossible, for the Commission to enquire into the validity of producer rates in individual proceedings, even through the mechanism of setting a contingent price.

Pipeline rate conditions, almost without exception, have been imposed in certificate proceedings involving major pipeline extensions which constituted substantially new and independent services.[42] It is possible in such cases to set a rate for the new service or extension based on its separate costs of operation and the total system costs, employing accepted allocation techniques, without special review of the pipeline's entire operations which in most cases would be generally familiar to the Commission from other proceedings. Because of the very different character of the gas production industry, however, it is sometimes impracticable to make separate determinations of rates governing a particular producer sale or sales, although this may be possible in the case of larger

certainties of the individual producer prior to drilling in undeveloped acreage, since he could not foresee the rate which would be allowed by the Commission in his case.

[42] Minor pipeline service extensions or sales usually are subject to the pipeline's existing rate schedules applicable to the area in question, and hence do not present rate controversies. See *supra*, pp. 87–88.

producers whose operations are conducted within well defined and historically distinct areas.

The reasons for this spring from the nature of gas production operations. Rate controversies, as we have said, have usually arisen in producer certificate proceedings seeking authority to sell gas produced from one well or a group of wells in a newly developed field or acreage. Although it may be possible to determine, after a period of operation, the production costs of these particular wells, and the producer's exploration and development costs applicable to the field in question, it may be impracticable to set a reasonable rate, including a fair return, without some consideration of the producer's over-all cost and revenue position which can only be explored in a combined proceeding reviewing all of the producer's operations and rates.

This results from the fact that the producer, as we have already noted, *supra*, p. 90, must continually explore for gas in order to stay in business, and must be able to recover in the price it receives for the gas it discovers and sells the cost of these exploration activities, a part of which inevitably will be unproductive. Although there may be exceptions in the case of larger producers with well developed production areas, these unproductive exploration costs in many cases have to be assigned to sales made from productive acreage so as to achieve an equitable distribution of this element of the cost of producing gas among the various ultimate consumers of the com-

modity."[44] See *Forest Oil Corp.* v. *Federal Power Commission*, No. 16844, C.A. 5, February 20, 1959, slip op. p. 5. Where this is the case, the unproductive exploration costs in a limited area may have to be viewed simultaneously with the producer's other sales and production costs in a single Section 5(a) proceeding."[45]

It would not be possible to obtain a broad view of a producer's operations by collecting and combining its certificate proceedings over a period of time, as a substitute for a Section 5(a) proceeding. In the first place, the Commission could not delay indefinitely producer authorizations until it had collected and consolidated a group of certificate applications without producing stagnation in the production industry, with long-term, adverse effects on consumer gas supplies. And even had the Commission forced the applicants to accept contingent rates, it still would be unable to review an applicant's overall operations in rate proceedings held subsequent to the certificate hearings, since at best only part of the producer's rate structure would be before it, unless it deferred review of the contingent rates to the completion of system-wide Section 5(a) proceedings. This, as we have seen,

[44] Problems in making this type of allocation are under current consideration by the Commission in a number of proceedings under Section 5(a) involving producer rates. See *infra*, p. 100, fn.46.

[45] The problem of making this allocation is complicated *inter alia* by the fact that many producing gas wells are operated marginally or even at loss, as a result of state conservation regulation, or geological factors.

would probably have had the disadvantage of substantially curtailing production activities for an indefinite period.

It follows that the Commission was on sound ground when it normally declined to explore the validity of the isolated producer rates in certification proceedings but rather deferred such questions to Section 5(a) proceedings, involving the entire jurisdictional operations of the producer. Section 5(a), or combined Section 4(e)–5(a) proceedings, examining the existing rates of most major gas producers in every important production area are now in progress, and others will be instituted as necessary staff and facilities become available. The Commission in these proceedings is currently exploring the proper allocation of costs and allowable rates of return required by the unique character of the producer's business.[48] Realistic and practicable answers to these questions can be obtained only through information developed in these proceedings, and such answers must be found before a workable formula for producer regulation can be evolved. Thus, as in the case of the pipelines, a producer rate formula will be developed in the course of Section 4(e)–5(a) proceedings involving system-wide rates, not by the examination of rates

[48] The Commission also, in December 1957, instituted the so-called "Omnibus" proceeding (Champlin Oil & Refining Company, Docket Nos. G–9277, *et al.*) in which a major effort is being made to collect and analyze producer rate schedules on file with the Commission, and to assemble data bearing on the costs and economics of gas production, competitive market criteria, the economics of ultimate markets for gas, and related topics. This consolidated study is intended to supplement the general Section 5(a) investigations now in progress. F.P.C. Annual Report, 1958, pp. 77–78.

governing isolated sales forming only a part of a producer's operations.[40]

B. GAS CONSUMERS HAVE RECEIVED ADEQUATE PROTECTION IN PRODUCER CERTIFICATE PROCEEDINGS

Although the difficulties we have enumerated have prevented the Commission from achieving rapidly a comprehensive, full-scale program of producer rate regulation, they have not thus far resulted in any substantial loss to the consumer of natural gas. The Commission, despite the greatly increased demand for additional gas services, has been able by effective use of its suspension and review powers under Section 4(e) and 5(a) of the Act to protect the consumer against unjustified rate increases pending completion of the major Section 5(a) proceedings now under way, involving rates of major producers in each important production area.

Since the *Phillips* decision in June 1954, the Commission has received approximately 5,260 producer rate increase filings (other than increases based on State production taxes), involving total increases of $120,000,000.00, on an annual basis. The Commission has suspended approximately 2,000 of these increases, involving $91,000,000.00, and has permitted to go into

[40] It will be recalled that the rate conditions imposed in pipeline certificate proceedings, to which reference is made, were adopted for the most part *after* the development of applicable rate criteria in system-wide Section 5(a) proceedings such as those involved in *Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U.S. 591; *Federal Power Commission* v. *Natural Gas Pipeline Co.*, 315 U.S. 575; and *Colorado Interstate Gas Co.*, v. *Federal Power Commission*, 324 U.S. 581.

effect without suspension approximately 3,260 increases involving $29,000,000.00. The proceedings in which no suspension order was issued involved, in almost all cases, either rates which were well below the general level prevailing in the field in question or filings which provided for merely *de minimis* increases. In such cases, the Commission has exercised its discretion in not suspending the increases under Section 4(e), in order to keep within manageable limits the burden on its staff in reviewing other rates and rate increases.

During the same period, as we have already noted, *supra,* p. 93, approximately 4,860 initial producer rate schedules were filed (in conjunction with new producer certificate applications) of which only 140 involved contested rates.

The Commission's decision not to pre-determine, as a general matter, the proposed initial rate in these cases, but to rely on its pending suspension proceedings under Section 4 and on Section 5(a) rate proceedings, has not resulted in significant increases in the prices paid by consumers for natural gas during the post-*Phillips* period. In fact, the Commission has largely succeeded during a period of generally rising prices in preventing substantial increases in the cost of gas paid by interstate pipeline companies as well as the rates charged by those companies to gas distributors by the use of selective rate suspensions pending development of a rate formula and the completion of major Section 5(a) proceedings.

The average cost of gas purchased by all pipelines from independent producers between 1954 (the year

Phillips was decided) and 1957 (the latest date for which figures are available), inclusive, increased from 9.9¢ per Mcf to 12¢ per Mcf, during a period when the wholesale price index increased from 110.3 to 117.[47] During the same period, the average price paid by residential consumers for natural gas increased only from 89.3¢ per Mcf to 93¢ per Mcf,[48] while the consumer price index increased from 114.8 to 121.6.[49] A 3.7¢ per Mcf average increase in the cost of residential gas, when viewed in the perspective of rising material and service costs borne by producers and pipelines during this period, while not *de minimis,* is clearly of not such a magnitude as to reflect adversely on the general policies adopted by the Commission, given the difficulties with which it has been confronted during the initial stage of producer regulation.

In summary, the Commission has neither violated the purposes of the Act nor abused its discretion in refusing to pre-determine all initial producer rates at this early stage in producer regulation. The Gas Act does not require the Commission to set initial pro-

[47] B.L.S. Statistics, reported in Economic Report of President, 1958, p. 156 (1947–1949=100).

[48] United States Department of Interior, Bureau of Mines: *Minerals Year Book* 1954, Minerals Market Report (1957) M.M.S. No. 2833, Average increase (or decrease) in the ten major consumer states for the same period was as follows (all in ¢ per Mcf): New York (147.5–152.2); Massachusetts (231.2–220; decrease); New Jersey (202.9–212.7); California (73.9–75.6); Connecticut (253.1–176.7; decrease); Michigan (95.2–92.8; decrease); Illinois (102.9–102.3; decrease); Pennsylvania (91.9–95.5); Ohio (66.4–71.8); and Wisconsin (134.5–125.7; decrease).

[49] B.L.S. Statistics, reported in Gas Facts, American Gas Association (1957), p. 224 (1947–1949=100).

ducer rates, and it would be impracticable and unwise for it to attempt to do so at this time in every contested case. Nor is such a procedure required by the public convenience and necessity or for the protection of gas consumers in view of the Commission's extensive powers over rates under Section 4 of the Act, and the pendency of Section 5(a) proceedings investigating the over-all rate structure of the industry. At this point in producer regulation, the Commission's discretion should not be restricted to the use of any pre-conceived procedure or method of producer regulation. Rather, it should be left free to develop those techniques and formulas which are best adapted to the unique characteristics of the production industry, and most capable of effectuating the Congressional purpose of consumer protection against excessive gas prices.

CONCLUSION

We do not, as previously stated, urge that the judgment below be reversed, but only that the main grounds expressed by the Court of Appeals be disapproved by this Court. Should the Court for any reason reach the broad statutory questions sought to be raised by the present petitioners, we respectfully submit that the Commission' position, as discussed in Points IV and V, above, is sound and should be adopted by the Court.

Respectfully submitted.

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I have authorized the filing of this brief.

J. LEE RANKIN,
Solicitor General.

APRIL 1959.

APPENDIX

1. The Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U.S.C. 717, *et seq.*, provides in pertinent part:

> SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connection with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.
>
> (b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.
>
> (c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this Act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.
>
> (d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classifica-

tion, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipality, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided*, That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after

it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same

by order: *Provided, however,* That the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.

* * * * *

SEC. 7. (a) Whenever the Commission, after notice and opportunity for hearing, finds such action necessary or desirable in the public interest, it may by order direct a natural-gas company to extend or improve its transportation facilities, to establish physical conection of its transportation facilities with the facilities of, and sell natural gas to, any person or municipality engaged or legally authorized to engage in the local distribution of natural or artificial gas to the public, and for such purpose to extend its transportation facilities to communities immediately adjacent to such facilities or to territory served by such natural-gas company, if the Commission finds that no undue burden will be placed upon such natural-gas company thereby: *Provided,* That the Commission shall have no authority to compel the enlargement of transportation facilities for such purposes, or to compel such natural-gas company to establish physical connection or sell natural gas when to do so would impair its ability to render adequate service to its customers.

(b) No natural-gas company shall abandon all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities, without the permission and approval of the Commission first had and obtained, after due hearing, and a finding by the Commission that the available

supply of natural gas is depleted to the extent that the continuance of service is unwarranted, or that the present or future public convenience or necessity permit such abandonment.

(c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however,* That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That

the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest.

(d) Application for certificates shall be made in writing to the Commission, be verified under oath, and shall be in such form, contain such information, and notice thereof shall be served upon such interested parties and in such manner as the Commission shall, by regulation, require.

(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension, or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require.

* * * * *

2. As originally enacted June 21, 1938 by Public Law No. 688 (H.R. 6586), 75th Congress, 3d Session,

Chapter 556, 52 Stat. 821, 825, Section 7(c), read as follows:

(c) No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new construction or operation of any such facilities or extensions thereof: *Provided, however,* That a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying increased market demands in the territory in which it operates. Whenever any natural-gas company shall make application for a certificate of convenience and necessity under the provisions of this subsection, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission. In passing on applications for certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

Nos. 518 and 536

THE ATLANTIC REFINING COMPANY, *et al.*,
Petitioners,
v.
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *et al.*,
Respondents.

TENNESSEE GAS TRANSMISSION COMPANY,
Petitioner,
v.
PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

SUPPLEMENTAL BRIEF
OF
RESPONDENT PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK.

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PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *et al.*,
Respondents.

SUPPLEMENTAL BRIEF

OF

RESPONDENT PUBLIC SERVICE COMMISSION OF NEW YORK IN REPLY TO *AMICUS CURIAE* BRIEF OF THE FEDERAL POWER COMMISSION.

On April 10, 1959, the Federal Power Commission filed an *amicus curiae* brief herein, specifically stating that "it does not urge that the decision below be reversed" (*id.* pp. 11, 105). Instead, the Commission urges disapproval by the Court of (1) the grounds stated by the Court below as the

basis for its decision; (2) the additional grounds urged by the New York Commission in support of its affirmance and, apparently, (3) any others which might sustain it.

The Commission's neglect to petition for certiorari in this action and its failure to file its *amicus* brief simultaneously with the briefs filed by petitioners, deprived the New York Commission of an earlier opportunity to answer the arguments therein contained. Inasmuch as the Commission's brief is hostile to our position, factually inaccurate in numerous specific respects and, absent full explanation, misleading in some of its implications, the New York Commission feels impelled to submit the instant reply.

SUMMARY OF ARGUMENT.

I.

The principal thesis of the Commission's argument, identical with that developed in its post-CATCO decisions*, is that the Commission may, should and probably is legally required to subordinate (i.e., eliminate) consideration of the issue of price in its appraisal of the requirements of public convenience and necessity in respect of producer sales (*Amicus* Br. p. 32 *et seq.*). We have commented at length in our initial brief** upon the factors which establish that the Commission is incorrect in this basic thesis. We propose to show herein that the factors upon which the Commission now relies to support its thesis simply do not support its position.

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* See N. Y. Comm. Br., pp. 36-42.

** N. Y. Comm. Br., pp. 46-52.

II.

The Commission's second argument would appear to be directly antipathetical to its primary thesis. It is that "in a number" (p. 41) or "approximately fifty" (ftn. 39, p. 93) producer-certificate proceedings, the Commission has actually emphasized rather than subordinated price considerations by attaching price conditions to its issuances of producer certificates. Thus, the Commission would suggest that, to an appreciable extent, its actual practice has been precisely the opposite of the policy it espouses in its brief and here asks the Court to accept as a sound regulatory approach to the initial-price problem.

Matters would be sufficiently confused if the Commission's brief disclosed all of the underlying facts. As we will show herein, it does not. Those facts, in summary, are that *within the last few months* and only in the direct shadow of review by this Court of its present producer initial-price policy, the Commission has given broad hints (but taken no definitive action to implement these hints) that it may, in the future, revive the use of its initial-price conditioning authority which last saw service in the *Signal* case.* It has not disclosed at what price or under what circumstances the price conditioning authority might again be called into play, if at all. It has not conceded the impropriety of, nor taken steps voluntarily to correct recent unconditional certifications at prices up to 23.3¢ per Mcf. It has not expressly relinquished its devotion to the "no interference with a contractually agreed initial price" principle. In fact, its *amicus* brief is primarily directed to advocacy of that principle.

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* *Matter of Cities Service Gas Co., et al.*, Docket Nos. G-2569, et al., Opinion No. 288, 14 F. P. C., 12 PUR 3d 3, affd. *sub. nom. Signal Oil & Gas Co.* v. *F. P. C.*, 3 Cir. 1956, 238 F. 2d 771, cert. den. 353 U. S. 923 (1957).

It is impossible at this date to evaluate the significance of the Commission's "new look." If it should emerge as a genuine price conditioning policy, it can only serve to emphasize the extreme impropriety of the CATCO decision. If it proves abortive, it can only emphasize the urgent necessity for judicial scrutiny of the Commission's existing initial-price practices.

III.

The Commission's third major point is summarized under its heading "Gas Consumers Have Received Adequate Protection in Producer Certificate Proceedings" (*Amicus* Br., p. 101).

The Commission presumably means to suggest, by the quoted language, that gas consumers have not been injured monetarily despite its failure to afford price protection in producer-certificate proceedings. That suggestion, however, would be as inaccurate as the one conveyed by the Commission's own words. As we hereinafter show, the Commission has used inappropriate statistical data which tends to obscure or minimize the obvious and inescapable adverse effect of its initial-price policy on natural gas consumers.

IV.

Finally, the Commission urges that CATCO is "atypical" and that this Court should, therefore, consider the case only for the limited purpose of disapproving the reasoning (but not reversing the decision) of the Court below.

There is nothing essentially "atypical" about this case. Unconditional certificates were here granted upon evidence of "arm's-length negotiation" of the contractual sales

price and upon threats (overt) to withdraw the gas if the producers' price demands were not unconditionally satisfied. Unconditional certificates have uniformly been granted in other producer-certificate proceedings upon similar evidence of "arm's-length negotiation" and similar threats (implied) of gas withdrawal. As petitioners in *Public Service Commission* v. *Federal Power Commission*,* we know of no essential difference between that record and the instant one. The Commission, the respondent in that case, has pointed out no essential difference. Resolution of the pressing initial-price question has already been too long delayed, to the serious and probably irreparable injury of the gas consuming public. Further delay would accomplish nothing but to preserve the exploitative opportunity and advantage presently enjoyed by natural gas producers.

ARGUMENT.

I.

Price is the vital element in a producer-certificate proceeding, as the Commission itself formerly recognized. There is nothing to support its present contrary view.

At pages 50-51 of its brief, the Commission purports to state the guiding principle of its present producer initial-price policy:

> "It is therefore clear, we submit, that on the face of the Gas Act the exclusive procedure for applying the 'just and reasonable' rate standards of Sections 4(a) and 4(b) to rate changes is provided by Sections 4(d) and 4(e), and to existing rates by Section 5(a)."

* C. A. 3, No. 12805.

We do not now dispute nor have we ever disputed the validity of this general proposition.* Neither do we now minimize, nor have we ever minimized, the difficulties in determining just and reasonable rates (*Amicus* Br., pp. 84-91). On the contrary, *because* of our reliance on rate proceedings for the ultimate determination of just and reasonable rates, and *because* of our appreciation of the difficulties and delays inherent in reaching such determinations, we have never insisted upon findings as to justness and reasonableness in certificate proceedings and we have consistently limited our requests for initial-price conditions to levels which are merely non-disruptive,** although these (as for example, the May 20, 1957, 18-cent price condition in CATCO) are uniformly higher than any price yet found to be just and reasonable in a completed rate proceeding or any price yet computed by the Commission's staff in a pending rate proceeding as equivalent to any producer's unit cost of service (including healthy allowances for return).

We do, however, dispute the validity of the inference drawn by the Commission from the quoted proposition—and others of similar ambiguity and generality—that the Commission should not, and probably has no power in a producer-certificate proceeding to scrutinize or to effect any alteration in contractually agreed initial prices. This infer-

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* The Commission appears somewhat confused as to which side is responsible for interjecting the opposite view into the action. At p. 32 it seems to attribute that role to Petitioners and at pp. 43, 47 and 72, to Respondents. Although we cannot speak for any other party, we wish to make it perfectly clear, if we have not already done so, that we have *never* claimed the Commission is required to determine "just and reasonable" rates in certificate proceedings. See N. Y. Comm. Br., pp. 49-50.

** i.e., "hold-the-line" prices—designed merely to safeguard the consuming public against unjustified price increases in the interim period until such time as just and reasonable producer rates may be determined.

ence, we believe, is not warranted by the quoted language or by the other factors on which the Commission relies.

Moreover, we believe that the Commission's policy of non-interference with contractually agreed initial prices has been responsible not only for the enormous and totally unjustified upsurgence in wholesale and consumer prices for natural gas, but that it has complicated the difficulties in and prolonged the resolution of those very rate proceedings under Sections 4 and 5, the completion of which the Commission would ask the consuming public to await.

a. The ordinary duty of a regulatory agency to "balance all elements"* in determining public convenience and necessity does not eliminate price as the "vital element" in a producer-certificate proceeding under the Natural Gas Act.

As we have previously observed**, the other "elements" which must ordinarily be balanced in certificate proceedings under other statutes, or in pipeline-certificate proceedings under the Natural Gas Act, are simply non-existent in producer certificate proceedings. Price is virtually the *only* element which gives purpose to a producer-certificate proceeding and meaning to the statutory producer certification requirement.

Even the Commission, which speaks in expansively plural terms of balancing "all elements," can concretely offer only one element to balance against that of price—i.e., the element of a public need for additional gas service.

We do not deny that a public need for gas service may properly be found to outweigh (1) injury to a competing fuel interest; (2) injury to another gas company serving in the area; (3) injury to industrial gas users; or even (4)

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* *Amicus* Br., pp. 39-44.

** N. Y. Comm. Br., p. 47.

objections of State Conservation Commissions (*Amicus* Br., pp. 42-43).

We do not deny that a finding of a public need for gas service must be made (in the *pipeline*-certificate proceeding) in order to support a determination that a proposed pipeline construction program should be authorized at all.

We do, however, emphatically deny that proof of that element, in the *pipeline* proceeding, should uniformly and automatically carry with it authorization for the related sale *at any price demanded.*

The primary function of the Commission, unlike that of a Chamber of Commerce, is not the promotion and satisfaction of an expansion of public needs or desires for the regulated commodity. It is to safeguard consumers against price exploitation. While the Commission may certainly balance the element of need against the element of price, and adjust the two by attaching initial-price conditions to its authorizations of sales (or otherwise), it may not, as a general rule of policy, totally sacrifice its most important duty solely in the interests of satisfying public need for additional gas service.

Ordinarily, no such sacrifice—no such either/or choice—is even necessary or called for. While the Commission believes it should voluntarily abjure its prime regulatory function—without even testing the effects of its exercise upon the continuance of ample additional supplies of gas—simply defies understanding.

b. The relative insignificance of price considerations in certificate proceedings under other statutes has no bearing on their vital importance in producer-certificate proceedings under the Natural Gas Act.

With complete disregard of the economic differences between the natural gas producing industry and other

regulated industries, the Commission cites the relative insignificance of price as an issue in certificate proceedings under other regulatory statutes as supporting authority for its subordination (elimination) of that issue in producer-certificate proceedings under the Natural Gas Act.*

We do not think it necessary to belabor the point that the legislative purpose reflected in the enactment of the regulatory statutes cited by the Commission (elimination or prevention of cut-throat price competition which had or would, if not curtailed, debilitate the industry) can scarcely be thought to be applicable to the natural gas producing industry.

We do, however, believe it is significant that we have been unable to discover any certificate proceeding under any of the cited statutes in which an applicant sought, much less obtained, authority for institution of a new service at a rate not only higher than its own existing rates for the same service, but 78%** higher than the average of all existing rates for the same service.*** We would suggest that therein lies the explanation for the relative unimportance of price issues in other certificate proceedings.

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* *Amicus* Br., pp. 69-77.

** Ratio of the Catco price, ex-tax, to the average wellhead gas price for the year 1957. See *Amicus* Br., p. 103.

*** In fact, in most of the cases cited on pages 72 to 76 of the *Amicus* brief, intervenors complained that the applicants' proposed initial rates were too low, rather than too high.

c. Nothing in the legislative history of the Natural Gas Act or in this Court's *Mobile or *Memphis*** decisions conflicts with the explicit language of Section 7(e) of the Natural Gas Act or inferentially repeals the Commission's statutorily conferred conditioning authority.**

Notwithstanding judicial affirmance, nine months after the *Mobile* decision, of the Commission's sole exercise of its conditioning authority (the *Signal* case), the Commission has recently been obsessed with an apparent conviction that *Mobile* has, in some manner, effected a judicial repeal of the conditioning authority explicitly conferred on it by statute. It seems to believe, in the light of that decision, not only that it *should not* interfere with contractually agreed initial prices, but also that *it has no power to do so* (*Amicus* Br., pp. 44-47). Nothing in *Mobile* supports this view.

The Commission purports to find further confirmation in the legislative history of the Natural Gas Act that its conditioning authority may not mean what the statute seems to say. The colloquy quoted in support of this belief (*Amicus* Br., pp. 53-55) appears to deal exclusively with the well-known procedure of filing existing contracts as rate schedules immediately upon the enactment of a new regulatory statute. It does not refer or appear to have anything whatever to do with the certificate section of the statute or the expressed conditioning authority contained therein.

The Commission's construction of obviously inapposite language to justify its expressed belief in its own lack of power to impose initial price conditions, suggests that the wish has been father to the thought.

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* *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332.

** *United Gas Pipe Line Co.* v. *Memphis Light, Gas & Water Division*, 358 U. S. 103.

d. The Commission's subordination (elimination) of the price issue in certificate proceedings has complicated and delayed its determination of just and reasonable rates in Sections 4 and 5 proceedings.

Although the Commission cites the rate sections of the statute as its principal justification for elimination and deferral of price scrutiny in certificate proceedings, it has resolutely ignored the fact that this policy has been responsible for impeding resolution of the very rate proceedings upon which it would rely for ultimate adjustment of all price inequities.

An illustrative instance is found in *Trancontinental Gas Pipe Line Corporation, et al.** The Commission, in accordance with its present policy, "subordinated" the price issue in its determination of public convenience and necessity and unconditionally issued producer certificates at price levels which it then knew would trigger favorite nations clauses in 35 of the buyer's existing gas purchase contracts. Twenty-two of the suppliers under the "triggered" contracts promptly submitted rate filings calling for the indicated increases. They have thereby added, at one fell swoop, 22 to the total number of rate proceedings which must be prepared, heard, argued, briefed and decided before just and reasonable rates can ultimately be determined for these suppliers. In this way the Commission's policy of non-interference with initial rates has helped to deprive natural gas consumers of protection against price exploitation not only at the certification stage but at all stages of the regulatory process.

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* Docket No. G-13143, *et al.* Opinion 315, 20 F. P. C. 264, apps. pdg., *Public Service Commission of New York* v. *F. P. C.*, C. A. 3, No. 12805, and *United Gas Improvement Co. & Philadelphia Electric Co.* v. *F. P. C.*, C. A. 3, No. 12797.

II.

Except for its *Signal* decision, the Commission has *never* taken effective action to safeguard natural gas consumers against excessive initial rates.

At pages 41 and 92 of its brief, the Commission alleges that it has imposed initial price conditions in numerous producer-certificate proceedings. Unamplified, these statements might suggest that, apart from the "atypical" CATCO fiasco, the Commission has ordinarily been diligent in curbing initial pricing excesses by natural gas producers. No inference could be more erroneous.

Between November 28, 1955, the date of its *Signal* decision, and November 18, 1958, the Commission did not once, to our knowledge, (except for its earlier superseded CATCO orders) attempt to impose a producer initial price condition or otherwise to check the rapid upsurgence in producer initial prices.* On the latter date, *ten days after the granting of certiorari, on the Commission's acquiescence, in Oklahoma Natural* ** *and four days after the filing of petitions for certiorari herein by the CATCO group,* the Commission for the first time gave a tentative and

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* An earlier proceeding, cited by the Commission as an instance of initial price conditioning, is actually a peculiar and non-recurring situation. In *Sunray Mid-Continent Oil Company*, Docket No. G-16134, app. pdg. *Sunray Mid-Continent Oil Company* v. *Federal Power Commission*, C. A. 10, No. 6061 (Amicus Br. ftn. 39, p. 93), Sunray, a late-signing, minority-owning signatory to a sale contract which had previously been certificated at 16¢, belatedly applied for certificate authority in its own name at the then escalated contract rate of 16.4¢. The Commission granted temporary authority at 16¢ with the proviso that Sunray's permanent certificated price await disposition of the pending rate proceeding on the lawfulness of its co-signers' 16.4¢ rate.

** *Oklahoma Natural Gas Co.*, v. *F. P. C.*, No. 288, October Term 1958. For the antecedent and subsequent history of that case, see N. Y. Comm. Br., p. 35, ftn. *.

wholly inconclusive hint of a possible change in policy. In issuing a *temporary* certificate of public convenience and necessity for a sale by Shell Oil Company at Docket G-13878*, it included a condition requiring the applicant to agree to accept retroactively the rate to be determined at the subsequent *permanent* certificate proceeding. Thereafter, and with increasing frequency during the last two months, similar conditions have been attached to other producer temporaries.

Since none of the temporary certificates so conditioned have yet culminated in the issuance of permanent certificates, it is plainly impossible, at this date, to evaluate fully this eleventh-hour change in the Commission's initial-price policy. There is, of course, no assurance that the permanent certificates, when issued, will carry with them the initial price conditions hinted at in the temporaries.**

The Commission's ostensible revival of an interest in initial-price conditioning at the courthouse door, via the inconclusive, tentative and readily reversible conditions imposed in respect of temporary certificates, indicates no change of attitude by the Commission in respect to its initial-price policy. This view seems to be confirmed by the intermediate decision on the first temporary certificate so conditioned. The Presiding Examiner there concluded (albeit reluctantly) that, notwithstanding the condition included in the temporary certificate, Commission pre-

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* We believe the docket reference at ftn. 39, p. 39 of the Commission's brief is incorrect in the last digit.

** The prospects therefor do not appear to us very promising. As late as September 4, 1958, the Commission had issued unconditional certificates to producers at prices up to 23.3¢ per Mcf. These prices were then known to cause triggering of the buyer's existing gas purchase contracts in an amount of $5,000,000 annually. The Commission's opinion of that date (ftn. p. 11, *supra*) contains no suggestion of retreat from or modification of its principle of non-interference with contractually agreed initial prices.

cedents prohibited his imposition of price conditions in Shell's permanent authority*.

One further aspect of the Commission's ostensible "new look" deserves the attention of this Court. With a single exception, all of the producers issued temporary certificates conditioned as indicated herein have accepted them, notwithstanding that their "economic hazards" in proceeding with the sales without certain knowledge of the price they will ultimately receive and their opportunities to "withdraw their gas from jurisdictional sales and dispose of it elsewhere than to interstate pipelines and the consuming public", were as great (or as non-existent) as CATCO's.

III.

Gas consumers have been and will continue to be seriously injured by the Commission's failure to afford adequate protection in producer certificate proceedings.

At pages 102-3 of its brief, the Commission states:

> "The average cost of gas purchased by all pipelines from independent producers between 1954 . . . and 1957 . . . inclusive, increased from 9.9¢ per Mcf to 12¢ per Mcf, during a period when the wholesale price index increased from 110.3 to 117. During the same period, the average price paid by residential consumers for natural gas increased only from 89.3¢ per Mcf to 93¢ per Mcf, while the consumer price index increased from 114.8 to 121.6."

The Court is evidently invited to infer that although the wellhead price of this regulated commodity increased far more rapidly than the wholesale price index for all com-

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* Intermediate decision of the Presiding Examiner in *In the Matters of El Paso Natural Gas Co., et al.*, Docket Nos. G-12580, *et al.*, issued February 26, 1959.

modities (21.2%*, as compared with 6.1%), the consuming public has not been correspondingly injured because the retail price of gas advanced less rapidly than the retail price of all commodities (presumably 4.1%, as compared with 5.9%).

These figures are suspect on their face. Reason insists that higher prices received by producers must ultimately be reflected in concomitantly higher prices paid by consumers, and that the passing on of price increases can be only temporarily impeded by a 5-month suspension at the pipeline level. Further analysis reveals that the figures are indeed more than suspect.

At the very outset, the Commission has used improper figures for purposes of its own comparison. The Bureau of Labor Statistics source cited at ftn. 49, p. 103 of the Commission's brief, indicates that the consumer price index for the year 1957 should correctly be stated at 120.2, not at 121.6 as shown in the Commission's brief (p. 103)**. By substituting the former figure for the latter, increases in retail natural gas prices would be shown to compare rather evenly with increases in retail prices for all commodities (4.1% as against 4.7%, rather than as against 5.9%).

Even this adjustment, however, fails to take account of another basic deficiency in the Commission's price comparisons. The Court will observe that the Commission has used Bureau of Labor Statistics data as sources for wholesale and consumer price indices and for wellhead natural gas prices (ftns. 47 and 49 at p. 103 of its brief). Significantly, it used another source (ftn. 48) for retail natural gas prices, despite the fact that the Bureau of

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* Comparison of nation-wide increases in wellhead prices with those for Louisiana only for the same period (N. Y. Comm. Br., p. 43), shows a much steeper rate of climb in the most prolific gas-producing area than in the nation as a whole.

** The Commission evidently selected the figure for the single month of December 1957 rather than for the full year, although it otherwise uses full-year average figures.

Labor Statistics compiles data for that item, that such data is readily available and, most important, that the Bureau of Labor Statistics compiles retail natural gas price data in the same manner as it compiles its other indices. Therefore, its indices are more appropriately comparable with each other than with data furnished by other sources using other methods of statistical compilation.

A possible explanation for the Commission's selection of a different source for retail gas prices does not lie far off. Data derived from Bureau of Labor Statistics reports show an increase in retail natural gas prices from 1954 to 1957 (divided into two component parts of 10-therm and 25-therm gas) not of 4.1%, but of 7.1% and 9.6%, respectively*. Thus,

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*COMPARISON OF INDEX OF RETAIL PRICES OF NATURAL GAS WITH CONSUMER PRICE INDEX

1954-1958

(1947-1949 = 100)

Year	Natural Gas		Consumer Price Index
	10 Therms	25 Therms	
1954	100.0	112.8	114.8
1955	101.8	117.3	114.5
1956	103.8	120.0	116.2
1957	107.1	123.6	120.2
1958	111.9	131.6	123.5
Per Cent Increase			
1954–1957	7.1%	9.6%	4.7%
1954–1958	11.9	16.7	7.6
1957–1958	4.5	6.5	2.7

Source: Index of Retail Prices of Natural Gas:
U. S. Department of Labor, Bureau of Labor Statistics, Retail Price Indexes of Fuels and Electricity:
1954: January 1935—August 1955 issue
1955: December 1955 issue
1956: December 1956 issue
1957: January 1958 issue
1958: December 1958 issue

Consumer Price Index:
1954–1957: Economic Report of the President, January 1959, p. 185
1958: U. S. Department of Labor, Bureau of Labor Statistics, *Consumer Price Index*, "Price for Selected Items & Groups, December 1957-December 1958."

appropriately comparable statistics would show that even in pre-CATCO days consumer prices for natural gas had increased more rapidly than retail prices for all commodities including those which were unregulated.

It is further significant that the Commission has chosen to terminate its comparison of wellhead and consumer natural gas prices at the year 1957, although Bureau of Labor Statistics data are available for the full year 1958 and the first month of 1959. The 1957 natural gas prices, of course, reflect only to a very minor extent wellhead prices as high as 21¢ per Mcf. They reflect not at all the CATCO price of 22.4¢ per Mcf*, nor the enormous volumes certificated at even higher prices after CATCO.

Data for 1958, as might be anticipated, show not only a continuation of the upward trend in natural gas prices, but also an acceleration in the rate of increase at both the wellhead and consumer levels. For example, although wellhead prices had increased an average of approximately 7% per annum for the 3-year period 1954-1957 (from 9.9¢ per Mcf to 12.0¢ per Mcf), they advanced 7.5% from 1957 to 1958 (from 12.0¢ to 12.9¢ per Mcf**). Similarly retail natural gas prices, which advanced an average of 2.4% per annum for 10-therm gas and 3.2% per annum for 25-therm gas for the period 1954-57, increased 4.5% and 6.5%, respectively, from 1957 to 1958***.

The Commission's attribution of increases of this rapidity and this magnitude to "rising material and service costs borne by producers and pipelines" (p. 103), would be gratuitous speculation at best. In the case of pipelines it is

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* CATCO gas began to flow in June, 1958.

** U. S. Department of Labor, Bureau of Labor Statistics, *Wholesale Price Index*, March 1958 to January 1959.

*** See ftn. *, p. 16, *supra*.

demonstrably untrue.* Their increased costs, for the most part, are in one area only—costs of purchased gas.** In the case of producers the relationship, if any, between rising costs and rising prices is the very subject of inquiry in pending rate proceedings and cannot be assumed by the Commission for the purposes of this action.

IV.

1. There is nothing essentially "atypical" about the CATCO proceeding and no reason for the Court to limit the ordinary scope of its review.

2. The decision below is not only correct on the particular facts of this case, but is of much broader applicability than the Commission is willing to recognize.

The Commission is seriously in error as to the precise content of the record which it has herein characterized as "atypical". It is in error in at least three specific instances.

First, the 21.4¢ price (ex-tax) demanded by CATCO was *not* "equal to or lower than a number of other current prices for gas produced in the same area from wells on dry land" (*Amicus* Br., p. 7, ftn. 5) as the record cita-

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* See Connole, *Threshold Prices: A Practical Proposal for Producer Pricing*, 63 Public Utilities Fortnightly 23, 26, Jan. 1, 1959.

** For example, according to Tennessee's Annual Report for 1954, its average cost of purchased gas was 10.30¢ per Mcf. In 1957, that average cost had advanced to 12.54¢ per Mcf (R. 44a). According to its most recent rate filing in Docket G-17166, its average cost of purchased gas for the test year ended July 31, 1958 was 16.02¢ per Mcf.

tion immediately following the Commission's statement clearly shows*.

Second, the Commission had *not* found that "the CATCO gas [if not certificated at the demanded price] would in all probability be employed as boiler fuel by industrial purchasers—a low grade and socially wasteful use of this fuel" (*Amicus* Br., p. 8). The record reference cited for such a finding discloses none. No such finding was made or could have been made, for the very obvious reason that the record contained no evidence to support it**. Moreover, as the Commission well knows, it may and has prevented the "socially wasteful" disposition of natural gas as boiler fuel by the very simple device of declining to issue pipeline authority to transport gas for this purpose***.

Finally, "the need for . . . the proposed sale" was *not* conceded by all parties to the proceeding (*Amicus* Br., p. 3). It certainly was not conceded by this party. Since the Commission had denied our motion to consolidate the CATCO proceeding with the related Tennessee certificate proceeding† and since the latter proceeding was not then under way (and was not concluded until January of the present year) we were in no position to concede Tennessee's need for CATCO gas under any circumstances. We certainly did not concede Tennessee's need for the CATCO gas at 22.4¢

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* And, in the face of CATCO's adamant refusal to explain their costs, the Commission can hardly assume the offshore location of the wells as a satisfactory explanation for the higher than onshore prices. Moreover, the CATCO prices (and higher) immediately washed up on shore (N. Y. Comm. Br., p. 36).

** See N. Y. Comm. Br., pp. 54-55.

*** *Re Mississippi River Fuel Corp.*, Opinion No. 250, 12 F. P. C. 109, 98 PUR (NS) 129 (1953).

† R. 332a-334a, 361a-366a.

per Mcf, that issue being the very heart of the entire controversy.

The record before the Commission in the CATCO proceeding and the Commission's order of June 24, 1957 show very plainly that unconditional certificates were issued to the CATCO applicants upon the bases of (1) arm's-length negotiation of the contractual initial price; (2) the finding (here unsupported) of a need for additional gas by consumers served through the purchasing pipeline; and (3) the threat (here overt) of contract termination and gas withdrawal unless certificates satisfactory to the applicants were forthcoming. Similar unconditional certificates of public convenience and necessity at similarly unjustified initial prices have been issued to producer-applicants upon precisely the same bases in literally dozens of proceedings*.

The *Amicus* brief devotes 12 pages (39-51) to the proposition that, when the element of public need for gas service is balanced against and found to outweigh the element of price, the Commission is justified in unconditionally certificating a proposed sale without further inquiry into the propriety of the price demanded. This proposition rests upon the basic assumption that the satisfaction of public needs for gas service is inherently incompatible with the obtaining of justifiable initial prices for gas; that the one element must necessarily be sacrificed to the other.

Yet the statute itself provides the perfect vehicle for accommodating both desiderata—by *granting* certificates of public convenience and necessity *and* imposing price conditions demanded in the public interest. The only basis for the Commission's "either/or" assumption is its apprehension that insistence on justification for prices chosen by

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* N. Y. Comm. Br., pp. 22-43.

applicants will inevitably be met by threats to withdraw supply. This apprehension is allegedly based upon a long list of factors (*Amicus* Br., pp. 95-101), none of which are supported by evidence in this or any other record. It is emphatically belied by the producers' general acceptance of the price-conditioned, temporary certificates issued by the Commission in recent days.

Thus, although the Commission's capitulation to unsupported threats of gas withdrawal is revealed with unusual dramatic intensity in CATCO, such capitulation is not in the least "atypical". It pervades all of the Commission's unjustified high price producer certifications issued to date. It pervades the whole of the Commission's philosophy on the subject of initial producer pricing.

The Court below has held that an applicant's intransigence, its (here expressly avowed) unwillingness to make an adjustment or accept the conditions required by public convenience and necessity, could not lawfully enter into, change, affect or influence the Commission's determination of whether the proposal, *as finally tendered,* was in the public interest or had been so proven. *A fortiori,* the Commission's *apprehension* of intransigence or unwillingness to accept conditions, can be given no greater weight in its consideration of the requirements of public convenience and necessity.

The Commission's assumption that the decision "rest[s] mainly on its particular facts*" and has "ceased to have general significance"**, though convenient (in that it spares the Commission the duty of applying the Court's reasoning where the particular facts—overt threats—are absent) is unfounded. The decision has already raised

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* *Amicus* Br., p. 17.

** *Amicus* Br., p. 18.

"questions of general importance". The very fact that the Commission is unwilling to acknowledge the broad scope of the decision below—that it has announced its intention to confine the holding to the precise, narrow and never-to-be-repeated facts appearing in this record—is, we respectfully submit, the most persuasive indication that full and unrestricted review (and ultimate affirmance) by this Court of the decision below is urgently required*.

Dated: May 6, 1959.

Respectfully submitted,

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* *Cf.* N. Y. Comm. Br., pp. 60-62.

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JAMES R. BROWNING, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

Nos. 518 AND 536

THE ATLANTIC REFINING COMPANY, ET AL.,
Petitioners,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, LONG ISLAND LIGHTING COMPANY and PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Respondents.

TENNESSEE GAS TRANSMISSION COMPANY,
Petitioner,

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, LONG ISLAND LIGHTING COMPANY and PUBLIC SERVICE ELECTRIC AND GAS COMPANY,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENTS LONG ISLAND LIGHTING COMPANY AND PUBLIC SERVICE ELECTRIC AND GAS COMPANY IN REPLY TO BRIEF OF FEDERAL POWER COMMISSION *AMICUS CURIAE*

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May 11, 1959

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The FPC brief *amicus curiae* is devoted principally to the proposition that the Commission is not obliged, in a producer certificate case, to make a finding that the initial rate is just and reasonable. We have never argued to the contrary, nor has the other respondent herein, nor do we now. This is a straw man.

Although, significantly, the Commission states it is not interested in reversal of the decision below, *Amicus* brief, pp. 11, 105, it argues that there is something exceptional or peculiar about the CATCO case which renders it an unsuitable vehicle for consideration by this Court of the question of the nature of the Commission's responsibilities with respect to initial rates in producer certificate cases. In truth, however, the CATCO case differs from *Texaco-Seaboard, Hope,* and the other cases only in that in CATCO we know, from both the first and second orders, that the Commission believed the public interest was being harmed because of the high initial price; and then we learned from the third (and final) order that the Commission concluded that its responsibility to the public with respect to initial rates would have to give way to the producers' demands, however unreasonable. In the *Texaco-Seaboard* case we are not permitted this plain insight into the Commission's mental processes, but the close parallel of the CATCO facts with the facts in the many other producer certificate cases which respondents have cited in their main briefs, permits only one interpretation: the Commission feels obliged to go along with any price which a producer can persuade a pipeline to pay because the Commission is afraid that if it does not do so, the gas will not be sold. In the CATCO case this course of reasoning is made clear.[1] Perhaps that is

[1] The policy of the Commission of refusing to consider the reasonableness of producer initial rates is illustrated by its very recent decision in *Middle States Petroleum Corp.*, Docket G-14836. There the staff of the FPC showed that the area prices not under suspension ranged from 6 to 14 cents. To determine whether the proposed 17 cent price was excessive the staff sought a subpena for the applicant's financial data relating to the production of the gas involved. The hearing examiner held the requested data to be irrelevant, denied the requested subpena and unconditionally authorized the sale. Pages 6-9 of opinion issued November 21, 1958. The FPC affirmed, adopting the decision of the hearing examiner. Order issued April 13, 1959. Commissioner Connole dissented. Thus,

a good reason for using the CATCO case as the vehicle case for examination of the legality of the policy.

In two other respects we comment on the Commission's brief. We consider the Commission's objections to the second form of order which it used herein and we discuss the question whether the Commission's policies have in fact kept down the price of gas to consumers.

I

1. The FPC attacks its own second order herein which its third order supplanted. Its principal attack is an economic argument: it urges that the second order approach would stifle gas production, because in the absence of established rate-making principles, gas producers would not be able to forecast "prior to drilling" the general area of the rate which the FPC would ultimately find reasonable, *Amicus* brief, p. 15, or whether the allowable return would be adequate to meet their expenses. *Amicus* brief, p. 96. These are spurious arguments for several reasons.

(a) The Commission presently ignores price questions at the certificate stage, but tries to pick them up later in §5 rate investigations. In fact, the starting of §5 proceedings is the Commission's excuse for forgetting price at the earlier stage. But if there is to be a §5 proceeding producers (including wildcatters) can not know what rate the FPC will ultimately find reasonable until its completion. Thus, the producer is as much in the dark about the ultimate rate (and his ability to recover his legitimate expenses) when the inadequate §5 remedy is used as when the perfectly fair second form of CATCO order is used. Similarly, to the extent that the wildcatter's ability to

although the FPC says that evidence of the existence of a market and economic feasibility establish only a *prima facie* case, this evidence in fact is treated as establishing a conclusive case, regardless of any excessiveness of the price.

finance his operations depends on the absence of uncertainty as to the rate he will be permitted to charge, as the Commission contends, *Amicus* brief, p. 96, the wildcatter will be as unable to obtain financing when the Commission uses the §5 route as when it uses the price condition solution.

The nub of the Commission's point is that the second CATCO order would tend to discourage drilling because the producer may worry that the Commission would deal unfairly with him when it gets around to deciding what is a just and reasonable rate. But if there is any substance to this, the producer would be just as worried that the Commission would deal unfairly with him when it fixes just and reasonable rates in the §5 proceeding.

(b) So long as the producer knows before he drills that he will be free to establish the reasonableness of the contract price in the certificate case as an alternative to accepting a price-conditioned certificate, it is difficult to see why he would be dissuaded from drilling by the second form of CATCO order. This is especially true since these certificate cases involve only proven reserves, and thus by the time of the certificate hearings the costs are known.

(c) These arguments of the Commission assume that producers would be significantly influenced in their decisions whether or not to drill in an area by the willingness of the Commission to postpone price considerations to subsequent §5 proceedings. But the fact is that most gas discoveries are made in the course of exploring for oil.[2]

It thus appears that not one of the arguments advanced by the Commission to support its worries about the economic effect of the second CATCO order approach has substance. It may be remarked, further, that these argu-

[2] See *Phillips Petroleum Co.*, Docket G-1148, examiner's opinion issued April 6, 1959, pp. 263-264.

ments are all newly discovered. The Commission did not rely on them in its third CATCO order, or in any of its other opinions in the field.

2. The second claimed defect (*Amicus* brief, p. 93) is that the records contain no rational basis for the price the second order approach would require the producer to accept in lieu of its contract price pending a rate hearing. And consequently its imposition, even though accompanied by safeguards for the producers, might be reversed by the Courts.

(a) The use of "other prices in the area" is thrown out on the ground that they "have not been appraised by the Commission". *Amicus* brief, p. 94. The Commission's brief ignores the fact that such other prices in the area were used by the FPC in *Pan American Petroleum Corp.*, 19 F.P.C. 463, to fix a just and reasonable rate, and are used by the FPC in determining whether to suspend a rate increase, which are both final decisions predicated on such prices;[3] whereas if such prices are used solely for the purpose of fixing the floor under an order of the type under discussion, a decision is not final but only interim, and if the new floor price is wrong, it is not the producers who can suffer but only the consumers.

(b) Moreover, so long as the producer is free as an alternative to accepting a price-conditioned certificate to establish the reasonableness of the contract price in the certificate case, it is difficult to see how it can be injured by use of this form of order. Furthermore, the producer can scarcely be harmed by a regulatory scheme which assures it of receiving a just and reasonable price, the maximum lawful price under the Act.

[3] See our main brief, pp. 43, 50. The pragmatic approach of the *Pan American* case has been cited with approval. See *Forest Oil Corp.* v. *FPC*, 263 F. 2d 622, 625 (5th Cir. 1959).

II

The FPC relies on a comparison between the increase in the consumer price index and the increase in the average price paid by residential consumers for natural gas in the period 1954-1957 and concludes that the increase in the cost of gas to consumers does not reflect adversely on its policies. *Amicus* brief, p. 103. The infirmity of this approach is that the figures do not reflect the spate of increases in the level of initial prices precipitated by the FPC's opening of the flood-gates, in *Natural Gas Pipeline Co. of America*,[4] a December, 1956 decision, in the instant case in 1957, in *Seaboard Oil Co.*,[5] *Hope Natural Gas Co.*,[6] *Superior Oil Co.*[7] and *Texaco-Seaboard*,[8] all of which were 1958 decisions.

Had the FPC included the latest available figures, which do reflect the unfortunate consequences to consumers of the FPC's administration of §7 of the Act, a wholly different light would be shed on the effectiveness of its policies. These figures are set forth and discussed at pp. 16-17 of the Supplemental Brief herein of Respondent Public Service Commission of the State of New York and need not be repeated here. Even the latest figures obscure the fact that low priced natural gas, sold under old contracts, as well as high priced natural gas, sold under more recent contracts, are included in the index of natural gas prices. This "rolling-in" of the low priced gas dilutes substantially the effect on the index of new high prices spurred by the Commission's hands-off policy on initial rates.

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[4] 16 F.P.C. 80.
[5] 19 F.P.C. 416.
[6] 19 F.P.C. 405.
[7] 19 F.P.C. 637.
[8] 20 F.P.C. 264.

By statistical sleight-of-hand the Commission attempts to convey the impression that where a genuine need for a price condition exists, it does not hesitate to impose one. *Amicus* brief, pp. 92-93. It refers to approximately 50 instances. But only in *Signal*[9] out of 4,860 producer filings (*Amicus* brief, p. 93, fn. 39) did it impose a rate condition in a final certificate. Thus, when the Commission states that "Most producer rate conditions have been imposed in granting temporary authorization to begin service • • •", it really means "In every case except one the producer rate conditions which have been imposed have been imposed in granting temporary authorization to begin service. • • •"

The difference between conditions in permanent and temporary certificates is vital. Temporary certificates are granted "without prejudice to such rate or other conditions as may be attached to the issuance of the [permanent] certificate. • • •" FPC Gas Regulations, §157.28, 18 C.F.R. §157.28. Even without the inclusion of a price condition in a temporary certificate, the Commission may impose a price condition in the permanent certificate (which, as stated, it did only in *Signal*); it may grant the permanent certificate, unconditionally; or it may even refuse a permanent certificate entirely. Thus, the fact that the FPC has included price conditions in temporary certificates is of no significance as respects protection of consumers.

Nor, to our regret, do we feel entitled to infer that the recent imposition of price conditions in temporary certificates presages a change in Commission policy toward untested initial producer rates. The defense offered by the Commission in its brief of its present policy of deferring any consideration of the reasonableness of

[9] 12 P.U.R. 3d 3 (1955).

initial prices to §5 proceedings rules out any such inference, as does a recent holding by the FPC that a producer applicant need not support the reasonableness of its proposed rate. *Middle States Petroleum Corp.*, Docket G-14836, April 13, 1959, *supra*, pp. 2-3.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the defense set forth in the *amicus* brief of the Commission's hands-off policy toward producer initial rates is insubstantial.

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May 11, 1959.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 518

THE ATLANTIC REFINING COMPANY,
CITIES SERVICE PRODUCTION COMPANY,
CONTINENTAL OIL COMPANY, AND
TIDEWATER OIL COMPANY,

Petitioners,

v.

PUBLIC SERVICE COMMISSION OF THE
STATE OF NEW YORK,
LONG ISLAND LIGHTING COMPANY, AND
PUBLIC SERVICE ELECTRIC AND GAS COMPANY,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

Petitioners, The Atlantic Refining Company, Cities Service Production Company, Continental Oil Company and Tidewater Oil Company (Producers), submit the following Reply to the briefs filed herein by Respondents[1] and by the Federal Power Commission (Commission) as *amicus curiae.*

[1] Public Service Commission of the State of New York (PSC), Long Island Lighting Company (Long Island) and Public Service Electric and Gas Company (Public Service) are collectively referred to herein as Respondents.

PRELIMINARY STATEMENT

Respondents argue that in a Section 7 certificate proceeding, the Commission must determine that the initial contract price satisfies rate criteria of Respondents' own making which, in effect, do nothing more than restate the Section 4 standard of "just and reasonable" without using the exact statutory phrase. Paradoxically, they steadfastly maintain that the Commission is not required to determine that the proposed initial rate is "just and reasonable" as a prerequisite to the issuance of certificates of public convenience and necessity. Respondents' insistence that they do not urge a determination of reasonableness in a certificate case — which creates a basic inconsistency in their argument — is an implicit recognition that this approach is administratively unworkable. Yet, no matter what words are used, such a determination is the necessary result of their argument.

As an alternative to having the Commission determine that the proposed initial rate is "just and reasonable", Respondents claim that the Commission should have attached rate reducing conditions to the certificates issued to the Producers. However, Respondents offered no evidence to support such a contention or to show that the proposed initial price was in any way excessive or unreasonable. In the final analysis it is apparent that this suggestion of Respondents is simply an attempt to substitute their judgment for that of the Commission with respect to the manner in which the public interest in reasonable rates should be protected.

The Commission's *amicus* brief is likewise inconsistent. It includes a complete answer to Respondents' contention that the June 24 order does not give adequate price protection to the consuming public. However, the Commission does not urge that the judgment below in this case should be reversed although it urges this court to disapprove of the main ground underlying such decision. This position can-

not be reconciled with the Commission's position in the court below and with the argument contained in the *amicus* brief relating to the proper function of the Commission in a Section 7 certificate proceeding. The Commission candidly admits it urges this anomalous result because the Producers have commenced service and allegedly are no longer free to withdraw their gas from interstate commerce (Br. 18). This is the only reason suggested by the Commission for affirming a decision which it admits is erroneous.

As recognized by both the Producers and the Respondents, and inferentially by the Commission's *amicus* brief,[2] the primary issue before this court for determination is the proper function of the Commission in a Section 7 certificate proceeding. In this case the fundamental issue narrows to a question of whether the June 24 order certificating the sales proposed by the Producers, subject to Section 5(a) rate investigations to determine the reasonableness of the proposed initial price, was a valid exercise of the administrative discretion vested in the Commission under Section 7 of the Act.

THE JUNE 24 ORDER EFFECTUATES THE CONGRESSIONAL PURPOSE TO HAVE INITIAL RATES ESTABLISHED BY THE CONTRACTING PARTIES

Respondents claim that the force of Section 4(a) requires the Commission to determine the reasonableness of the proposed initial rate in a Section 7 certificate proceeding. However, they are loath to embrace the logical consequences of this claim. For example, PSC states that (Br. 48):

> "Unless it is affirmatively established [in each and every Section 7 producer certificate proceeding] that the proposed sale *at such proposed initial price* is, in

[2] It is obvious that the Commission recognizes that the broad question as to the proper exercise of its certification authority to Section 7 is the basic issue which confronts the Court since over two-thirds of its brief is devoted to this question.

> all respects, reasonably in the public interest, the Commission is required by law either (1) to deny the application *in toto* or (2) to limit or condition the certificate to be issued upon reduction of the initial price to a level which the Commission has reason to believe will be without deleterious effect upon the interstate market, the interstate pipelines and, through them, the ultimate intrastate consumers."

Having contended that the Commission is duty bound to determine that the initial price is "reasonably in the public interest" and to deny certification unless it insures by condition that the initial price is reduced "to a level which the Commission has reason to believe will be without deleterious effect" (Br. 48), PCS elsewhere insists that it has "never claimed the Commission is required to determine 'just and reasonable' rates in certificate proceedings" (Supp. Br. 6). Thus, PSC would depart from the statutory standard and substitute criteria of its own making, by limiting its request "for initial-price conditions to levels which are merely nondisruptive," and which it defines as "hold-the-line prices". PSC's original brief in this case also discloses the error inherent in its assertion that every producer price in excess of the 17-18 cent level is due to the Commission's alleged failure to regulate initial prices properly (Br. 45). As shown therein, prices in the range of 20 cents per Mcf were being paid for gas reserves in Southern Louisiana long before the Commission exercised its jurisdiction over initial prices. *In the Matter of Gulf Interstate Gas Company*, Docket No. G-2058, Opinion No. 251, 15 F.P.C. 116 (1953).[3]

The arguments of Long Island and Public Service present the same dilemma. They say that "where the price proposed is not out of line there would be no need for lengthy hearings and extensive finding" (Br. 56). Without express reference to Section 4, they suggest that the Commission "take reasonable steps to safeguard the public interest in

[3] See PSC's Br. 23.

a just price," in issuing certificates under Section 7 (Br. 19). Similarly, using such terms as "the range of reasonableness" and "meaningful data bearing on the justness and reasonableness of the initial price" they again flirt with Section 4, saying (Br. 19):

> "The FPC has practical methods of accomplishing this whenever there is reason to believe that the proposed rate may not be within the range of reasonableness. It may require the producer applicant to present such meaningful data bearing on the justness and reasonableness of the initial price as could result in a valid finding in the §7 proceeding that the public interest requires the grant of the requested certificate at the proposed price. Or, if such data are not presented, it may employ some technique among the battery of techniques at its command to authorize the sale, and yet insure that the public will not be harmed until such time as the justness and reasonableness of the initial rate can eventually be determined."

Clearly, Respondents recognize the administrative chaos which would ensue from a requirement that a Section 4 determination of reasonableness be made in every Section 7 certificate proceeding.[4] However, equally clear is the fact that this is the inevitable result of the arguments which they present. Further, this is the very same vice which infects the decision below which would also require the Commission in a certificate proceeding to decide whether the initial contract rate is "just and reasonable" within the meaning of Section 4.[5]

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[4] PSC's Br. 50; Long Island's Br. 59.

[5] It is true that the court below denied "reaching this question" for it said:

> "'While the Commission probably should always consider the impact of the proposed initial rate in its determination of public convenience and necessity, we do not reach the question of whether the Commission must fix the initial rate when its inquiry demonstrates that there is a substantial question of the reasonableness of that initial rate. See *Oklahoma Natural Gas Co.* v. *Federal Power Commission*, and the dissenting opinion of Judge Bazelon, D.C. Cir., 257 F. 2d 634, 642."

In the very next sentence, however, the court seeks to decide that question,

Thus, it is apparent that the main thrust of the argument presented by Respondents is to require the Commission in every Section 7 certificate proceeding either to determine that the proposed initial price is just and reasonable or arbitrarily condition the certificate to provide for some lower price. This argument completely ignores the congressional intent that rates should be established initially by the contracting parties and not by the Commission. Under the Natural Gas Act, initial prices are set in the "individualized arrangements" between private parties, and the public interest in reasonable rates is adequately protected by the Commission's review powers under Section 5(a) and the rate-changing procedures of Sections 4(d) and 4(e). This division between the initial rate-making powers of natural gas companies and the Commission's review function was clearly delineated in *United Gas Pipe Line Company* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956), where Mr. Justice Harlan, speaking for the Court, stated:

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as to this case, placing the Commission's independence and courage at stake if it should wish to differ, in event of remand, with this judicial evaluation of what is required by the record (R. 659):

> "In the cases before us, the Commission has left no doubt of the importance and *necessity* of a consideration of the *reasonableness* of the proposed initial rate" (italics supplied).

In view of the reference in the decision below to the dissent by Judge Bazelon in the *Oklahoma Natural* case, it is interesting to note that he misread the Commission's *Signal* decision [*Re Cities Service Gas Company, et al.*, 12 PUR 3d3 (1955)] as holding "that the justness and reasonableness of the rate is a vital element in a [certificate] showing 'that the service proposed is or will be required by the present or future public convenience and necessity'" (258 F. 2d at 650). This is exactly the same mistake made by the court below (R. 658). But the Commission in *Signal* made it plain that it was not determining the *reasonableness* in that case, saying (12 PUR 3d at 16):

> "We wish clearly to state that in conditioning the order to follow to provide for a rate of 10 cents per Mcf, we do not find that this rate is the just and reasonable rate within the meaning of Section 4 of the Act."

The Commission reemphasized its position in denying rehearing, saying (15 F.P.C. at 1021):

> "We do not hold that the issue of rates in a certificate proceeding is identical in scope and effect with that in a section 4 and section 5 proceeding. The rate we deem proper to be charged if a certificate should issue is not necessarily the same we could find to be the lowest reasonable rate under Section 5. Criteria for prescribing a rate necessarily differ from criteria for proscribing a rate."

"In construing the Act, we should bear in mind that it evinces no purpose to abrogate private rate contracts as such. To the contrary, by requiring contracts to be filed with the Commission, the Act expressly recognizes that rates to particular customers may be set by individual contracts. In this respect, the Act is in marked contrast to the Interstate Commerce Act, which in effect precludes private rate agreements by its requirement that the rates to all shippers be uniform, a requirement which made unnecessary any provision for filing contracts. • • • Recognizing the need these circumstances create for individualized arrangements between natural gas companies and distributors, the Natural Gas Act permits the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public."

• • •

"• • • Moreover, the very premise that Sections 4(d) and (e) and 5(a) are alternative rate-changing 'procedures' is itself based on a misconception of the structure of the Act. These sections are simply parts of a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all rates are subject to being modified by the Commission upon a finding that they are unlawful. The Act merely defines the review powers of the Commission and imposes such duties on natural gas companies as are necessary to effectuate those powers; it purports neither to grant nor to define the initial rate-setting powers of natural gas companies."

• • •

"• • • In short, the Act provides no 'procedure' either for making or changing rates; it provides only for *notice* to the Commission of the rates established by natural gas companies and for *review* by the Commission of those rates. The initial rate-making and rate-changing powers of natural gas companies remain undefined and unaffected by the Act.

"All of the relevant provisions of the Act can thus be fully explained as simply as defining and implementing the powers of the Commission to review rates set initially by natural gas companies, and there is nothing to indicate that they were intended to do more. Admittedly, the Act presumes a capacity in natural gas companies to make rates in contracts and to change them from time to time, but nowhere in the Act is either power defined. The obvious implication is that, except as specifically limited by the Act, the Rate-making powers of natural gas companies were to be no different from those they would possess in the absence of the Act: * * *"

See also *United Gas Pipe Lines Co.* v. *Memphis Light, Gas and Water Division*, 358 U.S. 103, 111-114 (1958); *Phillips Petroleum Co.* v. *FPC*, 258 F. 2d 906, 917 (10th Cir., 1958). In other words, private contracts have an important function in the statutory scheme of regulation provided in the Natural Gas Act — by means of such contracts, the relations between the contracting parties, including the initial price, are established subject to the continuing supervision of the Commission.

The congressional intent to vest the initial rate-making function in private parties is further shown by the fact that under the Natural Gas Act the Commission does not have the authority to suspend initial rates.[6] By way of contrast, the Motor Carrier Act,[7] which served as a proto-type for the Natural Gas Act, empowers the Interstate Commerce Commission to suspend initial motor carrier rates and thereafter to determine the initial rate.

By establishing a statutory scheme of regulation whereby initial rates are set by private contracts, Congress has given the producers of natural gas the incentive required to explore for and develop the natural gas reserves neces-

[6] The suspension power given the Commission in Section 4(e) applies only to rate changes filed under Section 4(d) and does not apply to initial rates.
[7] 49 U.S.C. 301, et seq.

sary to satisfy the demands of the consuming public. If the producers were deprived of their initial rate making powers, their incentive to undertake the requisite exploration would be greatly diminished and the inevitable result would be a dimunition in the quantities of natural gas available — a result detrimental to the public interest.

Further, Congress necessarily realized that the interstate market would be in direct competition with the intrastate market for the available supplies of natural gas.[8] If initial prices for the sale of natural gas in interstate Commerce were established by the Commission, then the Producers would undoubtedly divert more and more of their gas to the intrastate market where they could be assured of receiving the initial prices provided for in their contracts. Obviously, Congress did not intend that the interstate market should be at a serious disadvantage in competing with the intrastate market, and, therefore, it created a statutory scheme whereby the contracting parties are permitted to establish the initial rate for the sale of their gas subject to the Commission's rate review powers in Section 4 and 5 of the Act. This congressional policy permitting initial prices to be established by the contracting parties also recognizes the administrative impossibility of requiring a determination in certificate proceedings that every initial rate is "just and reasonable." Such a determination can only be made by reviewing the entire operations of a producer and is therefore appropriate for a Section 5(a) proceeding wherein the Commission reviews company-wide operations and not for a Section 7 certificate proceeding which only involves a single sale, generally a small fraction of the producer's total production.

[8] Intrastate consumption of gas in Louisiana in 1957 amounted to 42.3% of the total production of that state; in Texas, the intrastate consumption amounted to 51.5% of the total production for 1957; and in Oklahoma, the intrastate market consumed an amount of gas equal to 68.4% of the total production of that state. (Bureau of Mines Mineral Market Report, MMS, 283-1957).

If it were administratively feasible — which it clearly is not — many producers would like to have a determination at the time of certification whether their initial contract rates were "just and reasonable." If such determination could be made at the outset, then the producers could reject the certificate offered to them if they did not like the price, or accept if they were satisfied with the Commission-determined price. The obvious result of such a practice would be that the producers would commit only their high price gas to the interstate market; the low price gas would be diverted to the intrastate market. In the final analysis, the consuming public would pay far more for natural gas than it does under the existing statutory framework whereby prices are established initially by the contracting parties. Thus, it is clear that there are substantial reasons behind the legislative policy that the Commission should review — not make — initial rates.

The first two orders in this case were nothing more than arbitrary attempts by the Commission to exercise initial rate-making powers. The order of April 22, 1957, issued temporary certificates to the Producers but remanded the proceedings to the Presiding Examiner for a determination "at what rate the public convenience and necessity" requires the sales to be made (R. 519, 523-523). This was an obvious attempt by the Commission to determine the initial rate. The order of May 20, 1957, likewise attempted to fix the initial rate by conditioning the permanent certificates issued to the Producers so as to reduce the initial rates from 21.4¢ per Mcf to 17¢ per Mcf (R. 528, 530). The May 20 order further provided that the Producers would be allowed to collect the contract price of 21.4¢, subject to refund, after the 17¢ price had been effective for one day (R. 528-529). In other words, what the Commission attempted to do by its May 20 order was to suspend an initial rate, an act for which

there is no statutory authority.[9] The Commission's orders of April 22 and May 20 usurp the initial rate-setting powers vested in private parties under the Natural Gas Act — a result diametrically contrary to this Court's analysis of the Act in *Mobile, supra.* Only in the June 24 order did the Commission properly exercise its review function with respect to the initial rate established by the Producers in their contracts. By certificating the proposed sales and instituting Sections 5(a) investigations, the Commission permitted "the relations between the parties to be established initially by contract, the protection of the public interest being afforded by supervision of the individual contracts, which to that end must be filed with the Commission and made public" (350 U.S. 339).. Since the June 24 order is supported by substantial evidence, it should be affirmed on this appeal.

THE PRODUCERS' DECISION TO EXERCISE THEIR CONTRACTUAL AND STATUTORY RIGHTS COULD NOT AND DID NOT PREVENT THE COMMISSION FROM CONSIDERING ALL FACTORS BEARING ON THE PUBLIC CONVENIENCE AND NECESSITY.

No matter how Respondents attempt to hide the fact, it is clear that the court below predicated its decision upon a determination that the Producers' so called "threats" deprived the Commission of its statutory jurisdiction to consider the Producers' certificate applications. In so concluding, the court below erred, for it is obvious that in refusing to accept the certificates tendered in the May 20 order, the Producers were merely exercising their undeniable contractual and statutory rights. Their refusal to accept the

[9] The Commission admits in its *amicus* brief that it does not possess the power to suspend initial rates. See Br. 37-38. The Commission's position is consistent with its rules and regulations which provide that an initial rate schedule "cannot be suspended" by exercise of the powers conferred on the Commission by the Act. 18 C.F.R. 2.4(d).

conditional certificates offered by the Commission's May 20 order could not and did not deprive the Commission of authority to reconsider all of the facets comprising the public convenience and necessity and then issue the June 24 order. No additional evidence was necessary to justify such reconsideration for Section 19(a) authorizes the Commission to "grant or deny rehearing or to abrogate or modify its order without further hearing";[10] and the fact that its final order contained findings inconsistent with those made in prior orders is of no consequence. *Virginia Ry. Co.* v. *U.S.*, 272 U.S. 658, 665-666 (1926).

The Producers' decision not to accept the certificates tendered in the May 20 order was predicated on that clause in each of their contracts which provided (R. 287-288):

> "2. Certificates of public convenience and necessity and construction of facilities:
>
> "(a) Each of the parties hereto will file with the Federal Power Commission and other regulatory bodies having jurisdiction, necessary application, if any, for certificates of public convenience and necessity satisfactory to the applicant without delay following the execution hereof. Such application, if any, will be prosecuted diligently to the end that, if issued, such certificates will be issued on or before April 1, 1957. *In the event any of such applications are denied, or if satisfactory certificates have not been issued by April 1, 1957, either party hereto may, by written notice mailed to the other party herto, terminate this contract in its entirety,* and if either such party so terminates this contract, then the respective obligations of the parties to sell and buy gas hereunder shall be of no force and effect from the date of such termination." (Emphasis supplied.)

Similar clauses are customary in gas sales contracts submitted to the Commission in certificate proceedings. The

[10] 52 Stat. 821 (1938), 15 U.S.C. 717r (a) (1952).

Producers here requested certificates in accordance with their contracts; it was then incumbent upon the Commission to review such proposals, and, if the Commission issued certificates, the Producers were free to accept or reject them. The freedom of a certificate applicant to reject a proffered certificate is a logical concomitant of this Court's opinion in *Mobile*,[11] for in no other way can privately negotiated contracts initially establish the relations between the parties. In effect, Respondents have set up a straw man of "threats" which have no existence in the facts of this case. The Commission recently disposed of a similar attack in the *Matter of Transcontinental Gas Pipe Line Corp.*, Docket Nos. G-13143, et al, Opinion 315, 20 F.P.C. 264 (1958), stating (20 F.P.C. at 283):

> "As to claimed producer threats, there are no such threats in this case. Various producers have reserved the right to terminate their contracts of sale with Transco if the seller does not obtain a satisfactory certificate. We do not consider such reservations to be any limitation upon our right of inquiry into proposed rates set forth in the several producer contracts. It must be recognized, however, that this Commission cannot force a producer to accept a certificate if it does not desire to, any more than we can force New York Natural to accept a certificate and transfer the properties involved in the proposed storage project previously discussed. Despite this, we do not here nor have we ever foregone consideration of price in the formulation of our judgment of where the public convenience and necessity lies. Where the possibility of the nonacceptance of a certificate exists, we think the proper course is the same followed in every certificate case — to consider the competing factors, evaluate the alternatives, and decide as the public convenience and necessity requires."

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[11] *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U.S. 332 (1956).

While loosely misusing the "threat" label, Respondents admit that the Producers were authorized to withdraw their certificate applications and cancel their contracts.[12] Having admitted that the Producers had the undeniable legal right to commit or decline to commit their reserves to interstate service under a proffered certificate, it is evident that the Respondents have continued to use the term "threat" to suggest that, by the exercise of such contractual rights, the Producers had required the Commission to forego consideration of one of the elements necessary to the formulation of its judgment — the proposed initial price. However, as is disclosed by a cursory examination of the June 24 order, the Producers' decision to exercise their contractual right of cancellation could not and did not limit the Commission's inquiry into the issue of price and all of the other factors comprising "public convenience and necessity."[13] Respondents' use of the term "threat" was born of advocacy and is completely without factual heritage. Indeed, PSC repeatedly attempts to capitalize on this constructed "threat", but then devotes more than two pages of its brief to demonstrate that there is not a "scintilla of proof" of the "threat" it seeks to exploit (Br. 54-55).

The Producers' rejection of the May 20 certificates was justified by another consideration. That order contains a condition reducing the initial contract price from 21.4¢

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[12] Long Island and Public Service state that it is an "undeniable proposition that an applicant need not accept a certificate unsatisfactory to it" (Br. 26, fn. 29). PSC makes a similar concession (Br. 53, 65). See also the Commission's *amicus* brief (Br. 20-22).

[13] The June 24 order states (R. 487):

> " * * * Important as is the issue of price * * * as far as the public is concerned, the precise charge that is made initially is less important than the assurance of this great supply of gas. * * * By virtue of the authority conferred upon us by Sections 4 and 5 of the Natural Gas Act * * * we are of the opinion that we will be able to adequately protect the public interest with respect to the matter of price."

When this plain language is considered in conjunction with the dissent by Commissioner Connole, it is evident that the June 24 decision was reached only after very careful consideration of the element of price.

to an arbitrary level of 17¢ per Mcf. Any condition under Section 7(e) must be reasonable and must have a rational basis in the record before the Commission. As stated by the Commission *In the Matters of Transcontinental Gas Pipe Line Corp., supra:*

> "Furthermore, if a rate condition is to be imposed, there must be some evidence showing to establish what the new rate should be. It is not sufficient to select arbitrarily or at random some price a few cents lower than that proposed by the producer. The new price must be arrived at on the basis of facts, in the application of some rational criterion, if the condition imposing it is to be found 'reasonable' as Section 7(e) requires. No such facts or criterion are present in this case."

Here there is absolutely no record evidence to support the 17¢ price condition in the May 20 order. Respondents introduced no evidence whatsoever to support a rate condition, but made conflicting suggestions as to the price level which should be imposed by the Commission (R. 378, 389, 394). For example, PSC suggested that the Commission impose a 15.4¢ price condition (R. 389) while Public Service suggested a rate condition "which would require that the proposed sales be made at such lower price which would protect the interest of the consumers" (R. 394). The fact that 17¢ was the highest price previously paid by Tennessee cannot form the basis for such rate condition, for the uncontroverted evidence shows that the proposed sales are not in any of Tennessee's Louisiana pricing districts and are in an entirely new area where there are no other sales and therefore no possible disruption of an existing price structure (R. 43-44). The only 17¢ contract referred to was a purchase that was made some 200 miles from the area involved in this case, and that price had not been appraised by the Commission, nor is there any evidence showing comparability to the sales in question (R. 351). Nor was the

17¢ price in any way related to the Producers' costs. Moreover, other pipelines were paying prices equal to or in excess of 20¢ per Mcf for smaller onshore reserves with less future potential[14] (R. 351). The fundamental error in the May 20 order is summarized by the Commission's *amicus* brief as follows (p. 94):

> "The 17¢ per Mcf price which the Commission originally sought to have the Producers accept in this proceeding (R. 528, 529) was probably subject to this defect. Although this was the highest price which Tennessee Gas was then paying, the Commission had no way of determining whether that price was at all an appropriate rate for the Catco sale, so that the justification for requiring the parties to substitute that price for the contract price of 21.4¢ per Mcf, even for a limited period of time, would be obscure."

Thus, the Commission concedes that its May 20 order was erroneous, further justifying the rejection of such certificates by the Producers.

The fundamental misconception as to the Commission's statutory jurisdiction underlying the decision of the court below is compounded by the fact that the objection was raised, *sua sponte,* in contravention of Section 19(b) of the Natural Gas Act. Both before the Commission and the court below, Respondent's objections were aimed solely at the question of price and directed to an alleged abuse of discretion by the Commission in refusing to condition the certificates issued to the Producers on June 24. Respondents' belated attempts to "stretch" their objections to cover the question of the court below as to the jurisdiction of the Commission rest upon a strained and unsupported construction of the word "jurisdiction" and clearly violate the intent

[14] The Producers' wells are located 15-25 miles offshore the coast of Louisiana in the Gulf of Mexico in water as deep as 90 feet (R. 520).

of Section 19(b) which precludes the urging of objections on review which were not presented to the administrative body for consideration.

Thus, it is apparent that the decision by the court below reversing the June 24 order because of its view that the so-called "threats" of the Producers deprived the Commission of jurisdiction is substantively and procedurally erroneous.

TENNESSEE'S NEED FOR THE GAS IS UNCONTROVERTED AND IS ESTABLISHED BY SUBSTANTIAL EVIDENCE IN THE RECORD.

Another facet of Respondents' attack on the June 24 order is their suggestion that the record evidence does not support Tennessee's need for the Producers' gas, although they do not challenge the actual existence of the need as such.[15]

The evidence in this record firmly establishes a *prima facie* case as to Tennessee's need for this gas. The very fact that Tennessee, with its demonstrated experience in purchasing gas for its constantly expanding system, had contracted to purchase this gas reserve and obligated itself to take or pay for a tremendous daily quantity from this reserve confirms the need for the Producers' gas (R. 490). Thus, the contracts themselves are a sufficient answer to Respondents' criticism. Further, the Commission knew that Tennessee had an application pending for authority to construct and operate facilities which would increase its average daily system capacity over 300,000 Mcf of gas per day in

[15] PSC's brief (p. 2) refers to the "phenomenal" demand for natural gas over the five years since this Court's decision in *Phillips Petroleum Co.* v. *State of Wisconsin*, 347 U.S. 672 (1954). PSC hedges its argument with respect to Tennessee's need for Producers' gas by stating that there was no proof of need *at the price* (Br. 56-59, Supp. Br. 19-20). However, its argument evaporates with its admission that "there is a continuing need for gas at reasonable prices" (Br. 56). This is clearly an admission that there is a "need" for the gas, leaving for decision the question of price, which is actually the focal point of Respondents' argument.

order to satisfy the requirements of its existing customers.[16] This application involved the construction of over 1,000 miles of additional pipeline and the installation of over 120,000 horsepower at an estimated cost of approximately $175,000,000.[17] The gas reserves involved herein were an integral part of the total reserves relied upon by Tennessee to support this application, which also included a request for authority to supply a portion of the large unsatisfied demand for gas in the Chicago area. As to this aspect of Tennessee's proposed service, evidence had been introduced in another proceeding showing that there were 260,000 house heating customers awaiting service in that area.[18] These were certainly facts which the Commission was entitled to consider in determining Tennesse's need for this gas.

Because of its familiarity with the tremendous growth in the consumption of natural gas and with the present and future needs of the customers of Tennessee, the Commission was well qualified to appraise this evidence of Tennessee's need for the Producers' gas. The demand of Tennessee's customers for additional gas was a primary consideration which the Commission could not ignore. See *City of Pittsburgh* v. *FPC*, 237 F. 2d 741 (D.C. Cir., 1956).

As noted by the Presiding Examiner, the *prima facie* case as to Tennessee's need for this gas was unchallenged and uncontroverted.[19] The Examiner issued certificates to

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[16] Docket No. G-11107. Of over 80 customers served by Tennessee, only four intervened in this proceeding. Of these four it is significant that Long Island and Public Service are the only two customers of Tennessee who did not seek additional supplies from Tennessee in Docket No. G-11107.

[17] *In Re Tennessee Transmission Co.*, 17 F.P.C. 461, 469 (1957).

[18] *In the Matter of Natural Gas Pipe Line Company of America*, 16 F.P.C. 80 (1956). See Long Island and Public Service Br. 41.

[19] The Examiner stated (R. 755, 760):

> "* * * None of the interveners made any substantial contention that the acquisition of these reserves by Tennessee were improvident or useless or were other than favorable to the interests of the public served by Tennessee's system. In fact, the only objection by interveners to the granting of a certificate to these applicants is to the price at which these reserves were acquired by Tennessee.
>
> "The facts of this proceeding indicate that these reserves are important to Tennessee's expansion and it is known that the demands for natural gas is almost everywhere in excess of that available from pipeline systems."

the Producers subject to the issuance of a certificate to Tennessee for the construction of the necessary facilities to take the gas from Producers. This qualification was imposed by the Examiner not because of any doubt as to the need for the gas but so that his decision could not conflict with the determinations in Docket No. G-11107 involving Tennessee's application for the necessary facilities.

The Commission's order of April 22, 1957, expressly adopted the Examiner's finding as to Tennessee's need for this gas without the qualifying condition (R. 836):

> "The Examiner has found that there is a need for those volumes of gas on the system of Tennessee Gas, and that the applicants are ready and able to deliver them and take them, respectively. These findings we adopt. They argue conclusively that the sale is necessary in the public interest."

On the same day, as noted in its April 22 order, the Commission issued a temporary certificate to Tennessee in Docket G-11107 to construct the 107 miles of gathering line to bring the gas here involved to Tennessee's system at Kinder, Louisiana (R. 522).

The Commission's May 20 order adhered to the same view of the need for this gas (R. 904):

> "In view of the need for the volumes of gas and the exigencies of the construction schedule to which we averted in our previous order, we are disposed to modify our order of April 22, 1957, and to grant a permanent certificate to Catco * * * ."

The Commission's final order of June 24, 1957, also recognized the need for this gas, stating (R. 925):

> " * * * We are moved by the primary consideration that the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas. Further, it appears to us, important as is the issue

> of price, that as far as the public is concerned, the precise charge that is made initially is less important than the assurance of this great supply of gas. • • • We are of the opinion that, in the circumstances of this case, in view of the great demand for gas by customers of Tennessee Gas, the price consideration should not be made the prime determinant of what the public convenience and necessity require."

Thus, it is evident that the Commission consistently recognized Tennessee's need for this gas despite Respondents' inferences that it was a unique factor in the June 24 order.

Respondents' real motivation in challenging the findings as to Tennessee's need for this gas is disclosed by the fact that they did not apply for rehearing of the April 22 and May 20 orders which granted certificates to the Producers. If Respondents were actually challenging the granting of certificates to the Producers on the question of need, they were required to apply for rehearing of these prior orders. Section 19(a) of the Act; *FPC* v. *Colorado Interstate Gas Co.*, 348 U.S. 492 (1955). So long as Respondents contend that the May 20 order was proper, they necessarily concede that a need for the gas exists.[20]

Tennessee's need for the Producers' gas is established by the uncontroverted evidence of record. Such need was a proper factor for the Commission to consider in weighing all of the elements comprising the public convenience and necessity. Respondents' contention that the Commission's June 24 order dispensed with consideration of the initial price is patently erroneous. Even a cursory examination of the June 24 order discloses that the Commission carefully considered the initial price and, after evaluating *all* the various factors which make up the public covenience and necessity, determined that it was in the public interest to

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[20] The brief of Long Island and Public Service characterizes the May 20 order as "this fair solution" (Br. 20) and "the fair second order" (Br. 27). This is consistent with their statements in the court below that the May 20 order was a "wise decision" and "showed careful consideration of the public interest."

certificate the proposed sales subject to Section 5(a) rate investigations. Clearly, Respondents' real complaint is not that the Commission subordinated price considerations to Tennessee's need for the gas, but that the Commission failed to make price the *sole* determinant of the public convenience and necessity.

Gas is an exhaustible natural resource. The economic value and life of a pipeline are directly measurable by the size of the supporting reserves. It is probably a matter of common knowledge that no pipeline ever has enough reserves; it is certainly within the administrative expertise of the Commission whether there is a need for additional reserves to improve the reserve life index of a particular pipeline. Hence, even if there were no record evidence as to Tennessee's need for this gas — a point unchallenged during the proceedings — the Commission's conclusion on the question of need would still come within its competence.

THE COMMISSION'S AMICUS CURIAE BRIEF — A CORRECT ANALYSIS OF THE APPLICABLE LAW WITH AN INCONGRUOUS RESULT.

The *amicus curiae* brief filed herein on behalf of the Federal Power Commission is a complete anomaly. The brief contains a thorough, lucid and accurate statement of the Commission's function in a Section 7 certificate proceeding which conclusively demonstrates that the June 24 order was a proper exercise of the Commission's administrative discretion. However, the Commission does not urge reversal of the decision below, although it states that the principles underlying such decision "are clearly incorrect and must be disapproved." The inconsistency between the argument presented and the result urged is compounded by the Commission's view that the decision below requires reimposition of the May 20 order (Br. 18) which the Commission admits is erroneous (Br. 94). The Producers do not agree with the Commission that this is the effect of the Third Circuit's judgment, but they are completely baffled

by the Commission's retreat from the June 24 order which it fought so hard to preserve in the court below in favor of the May 20 order which the Commission now states is defective.

This paradox cannot be clearly explained. However, it should be noted that in the court below the Commission filed a petition for rehearing which strongly supported the June 24 order, a position directly contrary to that espoused in the *amicus* brief filed in this Court. After stating its changed and curious position, the Commission then devotes the next seventy-two pages of its brief to the development of principles which, if applied here, would require affirmance of the June 24 order. This is particularly true of Point V. (Br. 81-106), where the Commission spells out a point-for-point defense of its treatment of the price problem in producer certificate cases. Without exception, each of these points necessitates reversal of the decision below and affirmance of the June 24 order.

The Commission frankly admits that it has reversed its position only because the Producers have commenced service. (Br. 18).[21] In effect the Commission would apply a double standard in producer certificate cases, whereby its determination as to the public convenience and necessity is primarily resolved with reference as to whether or not a producer is bound to accept whatever certificate is issued to him. Evidently if the Producers herein had refused to commence deliveries under the certificates issued them in June 24 order until the final decision in this case, the Commission would now be urging this Court to reverse the decision below.

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[21] The Producers do not wish to inject into this case any discussion as to the effect to the commencement of service by them under the June 24 order. Any question as to the Producers' right to discontinue such service if the June 24 order is reversed is premature. There is no substance to the impression conveyed by the Commission's brief that it is well established that having commenced the sale under authority of the June 24 order, the Producers cannot "lawfully abandon" that service except with permission of the Commission under Section 7(b). Prior to the filing of its petition for rehearing in this case in the court below, the Commission had, so far as the Producers can determine, never before taken that position in any order, decision, or even in legal documents filed by its counsel.

The Commission's brief states that this is not now a case of general importance since it allegedly rests on the particular facts and circumstances surrounding the proposed sales (Br. 18). Therefore, the Commission urges this Court to defer consideration of the fundamental issues raised on this appeal until such issues are presented in *United Gas Improvement Company* v. *FPC*, No. 12797 and *Service Commission of New York* v. *FPC*, No. 12805, now pending in the Third Circuit Court of Appeals. Although the Commission alleges that the record in this case is of an "atypical character," it does not point out a single factual difference or in any way distinguish the present case, except that it states that this Court need not concern itself with the basic issues presented in this case because the Producers have commenced service and therefore allegedly are no longer free to refuse to sell their gas and to reject a permanent certificate. Most assuredly, the fact that the Commission believes that the Producers are now "trapped" has no effect on the merits of their appeal or on the significance of the issues raised by such appeal. In fact, this one distinguishing feature between the present case and those two now pending in the Third Circuit has been removed, for the certificate applicants in those two cases have likewise commenced service.

Aside from these differences, the Producers are in full agreement with the arguments presented in the Commission's *amicus curia* brief as to the proper function of the Commission under Section 7 of the Natural Gas Act.

CONCLUSION

Whatever legal pathway is here followed by Respondents, it inevitably leads to one conclusion — they are dissatisfied with the manner in which the Commission has determined public convenience and necessity in Section 7 certificate proceedings. In the present case, Respondents are displeased by the Commission's determination that the pub-

lic interest in reasonable rates will be adequately protected by Section 5(a) proceedings. Respondents insist that such protection could be provided only by the imposition of an arbitrary price condition. When stripped of the verbal camouflage which surrounds them, these arguments are revealed as nothing more than an attempt to have this Court substitute its judgment for the administrative discretion of the Commission with respect to the consideration to be given the initial price in determining public convenience and necessity in a Section 7 certificate proceeding. The error inherent in the application of such argument to the present case is apparent, for it is fundamental that where an administrative agency has a choice of remedies and selects one, that choice will not be set aside merely because another remedy might have been more appropriate. *General Protective Com.* v. *SEC*, 346 U.S. 521 (1954); *Franks Bros. Co.* v. *NLRB*, 321 U.S. 702 (1944). Further, when Congress has entrusted an administrative agency with the responsibility for selecting or determining the means of achieving a statutory policy, the relation of remedy to policy is peculiarly a matter for administrative competence. *General Protective Com.* v. *SEC, supra; American Power and Light Co.* v. *SEC*, 329 U.S. 90 (1946); *Halstead* v. *SEC*, 182 F. 2d 660 (D.C. Cir., 1950).

In effect, Respondents attempt to emasculate the administrative discretion entrusted to the Commission by the Natural Gas Act and to destroy the initial rate setting powers of private parties as delineated by this Court in *Mobile, supra*. Respondents would require the Commission to determine public convenience and necessity in a manner which not only violates these fundamental concepts but is administratively unworkable and will inevitably curtail the supplies of natural gas committed to the interstate market to the detriment of the consuming public.

For the additional reasons urged herein, the Producers respectfully submit that the decision of the court below should be reversed and that the Commission's June 24 order should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 536

TENNESSEE GAS TRANSMISSION COMPANY, *Petitioner*

v.

PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, LONG ISLAND LIGHTING COMPANY, AND PUBLIC SERVICE ELECTRIC AND GAS COMPANY, *Respondents*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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REPLY BRIEF FOR PETITIONER

I

In our main brief, we argued (pp. 20-27) that the Natural Gas Act does not require a finding of justness and reasonableness of initial rates in certificate cases. Respondents, Long Island Lighting Company and Public Service Electric and Gas Company, concede the point (Br. p. 36). Respondent, Public Service Commission of the State of New York, also concedes the point (Br. p. 49). The Federal Power Commission, as *amicus curiae*, contends that this point was expressly pretermitted by the court below and that it need not

be reached by this Court in this case (Br. p. 28). However, if the Court is of a contrary view, the brief of the Federal Power Commission (at pp. 32-81) clearly supports and expands on our argument on this point.

II

While, as noted above, Respondents concede that a finding of justness and reasonableness of the initial rate is not required in a Section 7 certificate proceeding, they contend, on the other hand, that the Federal Power Commission is under a statutory duty to scrutinize and evaluate the initial price proposed in every Section 7 producer application (New York Commission Br., pp. 46, 48; Long Island, Br. pp. 30-32). The "prime determinant" of whether a certificate of public convenience and necessity should be issued to a producer is, according to the New York Commission (Br. p. 46), the level of the initial price proposed. Long Island and Public Service go so far as to contend that the Federal Power Commission must "regulate initial prices" (Br., p. 21).

Long Island and Public Service suggest a formula by which the "reasonableness of a proposed initial rate" should be tested by the Commission. Thus, they suggest that "comparison with going field prices, and consideration of such related matters as the volumes involved, the effect on the buying pipeline, and possibilities of escalation, would be an adequate test of the reasonableness of a proposed initial rate" (Br. p. 53).

The New York Commission contends (Br. p. 48) that:

> "* * * Unless it is affirmatively established therein that the proposed sale *at such proposed initial price*

> is, in all respects, reasonably in the public interest, the Commission is required by law either (1) to deny the application *in toto* or (2) to limit or condition the certificate to be issued upon reduction of the initial price to a level which the Commission has reason to believe will be without deleterious effect upon the interstate market, the interstate pipelines and, through them, the ultimate intrastate [sic] consumers. * * *"

Turning to the Long Island formula, it is to be noted that the 21.4-cent price here involved does compare favorably with going field prices (See New York Br., pp. 22-30; R. 351a). The CATCO gas reserve is the largest reserve ever committed to one sale, and is the first sale from a newly-developed offshore field (R. 521).[1] The effect on Tennessee, the buying pipeline, was to increase its average cost of purchased gas less than one cent per Mcf (R. 45a).[2] Failure to obtain the reserves would have impaired Tennessee's ability to expand its system so as to supply the increased demands of its customers.[3] The future price escalation pro-

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[1] Large gas reserves have greater value to pipeline companies and consumers in view of the fact that a single gathering facility can be used to obtain large volumes of gas. Attachment of several smaller reserves involves construction of more gathering facilities thereby increasing the cost of bringing gas into the pipeline system.

[2] Had Tennessee been obliged to obtain several smaller reserves equal in total to the CATCO reserve, the cost of service related to the additional gathering facilities might very well have been in excess of any price differential at which the smaller reserves might have been purchased.

[3] In this connection, it is interesting to note that Long Island and Public Service did not request additional gas supplies in Tennessee's recent major expansion program certificated by the Commission in Docket G-11107. The CATCO reserves constituted a highly important part of Tennessee's over-all reserves needed to support

vided for in the contracts are all subject to Federal Power Commission approval. Thus, contrary to Long Island's assertion (Br. p. 53), the CATCO price meets Long Island's suggested formula in every respect.

As to the New York Commission's contention, it is readily apparent that its quarrel with the Federal Power Commission stems from the fact that the Commission considered it more in the public interest to assure the CATCO gas reserves for the interstate market, than to insist on the 17-cent initial price condition[4] it had imposed in its May 20, 1957 order (R. 528-9), and thereby lose the reserves for the interstate market.

It is apparent from the foregoing and from Respondents' briefs that the basic question here is whether the Commission abused its discretion in issuing certificates to the producers without attaching a price condition. Respondents contend, in essence, that it was an abuse of discretion not to impose a price condition which would protect consumers against the possibility of temporarily paying a rate higher than a just and reasonable rate (Long Island Br. pp. 28-33, 36; New York Commission Br. p. 48). Respondents persist, however, in closing their eyes to the fact that imposition of the condition would have resulted in the loss of the CATCO reserves to the interstate market, and might have forestalled the ability of Tennessee to meet the increased requirements of its customers.

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that expansion program involving additional service to Tennessee's existing customers at an estimated cost of construction of $175,000,000 (See 17 F.P.C. 461, 469; Order issued in Docket G-11107 January 28, 1959).

[4] This price was selected simply because it was the highest price being paid at the time by Tennessee (R. 529).

The New York Commission is apparently of the view that the CATCO producers were "bluffing"; that they would have had to accept a price condition because there was no other market for the gas. (Br., p. 55). The short answer is that neither Tennessee nor the Commission believed the producers were "bluffing" (R. 416a-423a, 487). Additionally, the record shows that the CATCO producers had reserved in their contracts the right to build their own gathering system to bring the gas to the shore in the event satisfactory certificates were not received by a specified date (R. 93a-97a, 246a-247a). Regardless, the fact remains that the Power Commission, in the exercise of its judgment and discretion, considered it more in the public interest to assure the gas for the interstate market than to run the risk of losing the gas entirely.

It cannot be denied that there is a *possibility* that the 21.4-cent price may be found to be excessive in the rate investigation instituted by the Commission under Section 5(a). If so, the excess if any, paid for the gas from the date of initial deliveries (July, 1958) until the culmination of the pending Section 5(a) producer rate investigations, will not be subject to refund by the producers. Because of this *possibility,* Respondents argue that the Commission should have insisted on the 17-cent price condition with the one-day suspension technique. *Respondent's argument, carried to its logical conclusion, would require the Commission to use the same technique in each and every initial rate filing, as well as in each and every rate increase filing, to which an objection is raised.* The short answer to such contention is that Congress did not so provide, nor does the Natural Gas Act so contemplate. Congress did not give the Commission authority to suspend *initial rates. Federal Power Commission* v. *Hope*

Natural Gas Company, 320 U.S. 59. Nor did Congress require all increases in *existing filed rates* to be suspended on complaint, protest or otherwise. On the contrary, Section 4(e) of the Natural Gas Act makes it clear that the power to suspend changes in existing filed rates is a discretionary power lodged in the Commission. *Continental Oil Company* v. *F.P.C.*, 236 F. 2d 839, 843-4 (5th Cir., 1956); *cert. denied*, 352 U.S. 966, 77 S. Ct. 352.

This case was one calling for the exercise by the Power Commission of its informed judgment and administrative discretion. The opinion of the Commission, together with the dissenting opinion of Commissioner Connole, demonstrates clearly that the matter of price was very carefully considered and weighed by the Commission before it reached its decision to eliminate the 17-cent initial rate condition. The Commission, in the light of its evaluation of all the facts, and circumstances, was of the view that its rate investigation under Section 5(a) of the Natural Gas Act would best protect the public interest. Respondents argue that a different course of action would have better served the public interest. The law is well-settled, however, that where an administrative agency has a choice of remedies and selects one, that choice is not to be set aside merely because it is urged that another remedy might have been more appropriate (see cases cited in our main brief, p. 32).

There is nothing unique or novel in an administrative agency changing its views upon reconsideration. As the court stated in *Cia Mexicana de Gas* v. *F.P.C.*, 167 F. 2d 804, 806-7 (5th Cir., 1948):

> "A commission, * * * may, indeed should, change its findings and order if on rehearing it is of a

different mind. If it does so change, our function on a review of its findings and order is to determine not which of the two findings and orders was the best but whether, as claimed by petitioners, the findings and order under review are without evidence to support them. * * *"

III

Respondents attack the Federal Power Commission's finding as to the need by Tennessee for the gas involved here. The Commission's order issued January 28, 1959 in Docket G-11107 should remove any doubt as to the need by Tennessee for the gas involved.[5] In any event, Respondents cannot now attack the finding of need inasmuch as neither of them applied for rehearing of the April 22, 1957 and May 20, 1957 orders herein which granted a temporary certificate to Tennessee and permanent certificates to the producers, respectively, based on findings of need for the gas. If Respondents desired to challenge the grant of the certificates on the ground of lack of need for the gas, they were required to apply for rehearing of the orders granting those certificates. Section 19(a) of the Natural Gas Act; *Federal Power Commission* v. *Colorado Interstate Gas Company,* 348 U.S. 492, 497. Moreover, Respondents raised no question at the hearing concerning the need for the gas.

IV

The briefs of Respondents do not raise any matters, other than those discussed above, which are not

[5] Cf. *United States* v. *Pierce Auto Freight Lines,* 327 U.S. 515, 529, wherein the Court stated in somewhat similar circumstances: "The contention in its farthest reach amounts to a legal version of the scriptural injunction against letting one's right hand know what one's left hand may be doing."

answered by the arguments contained in the main briefs and the *Amicus* brief of the Federal Power Commission. However, we take issue with the Federal Power Commission insofar as it states, in its *Amicus* brief (pp. 11, 18) that reversal of the judgment of the court below is unnecessary. As we read the *Amicus* brief, it is an excellent demonstration of the legality and propriety of the Commission order here under attack, and of the error of the court below. We, therefore, fail to understand how the Commission can validly contend that the judgment of the court below should not be reversed.

CONCLUSION

For the reasons here stated and in our main brief, it is respectfully submitted that the judgment of the Court of Appeals should be reversed.

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May 18, 1959

SUPREME COURT OF THE UNITED STATES

Nos. 518 AND 536.—OCTOBER TERM, 1958.

The Atlantic Refining Co., Cities Service Production Company, Continental Oil Company, et al., Petitioners,	
518 v.	
Public Service Commission of the State of New York, Long Island Lighting Co., et al.	On Writs of Certiorari to the United States Court of Appeals for the Third Circuit.
Tennessee Gas Transmission Co., Petitioner,	
536 v.	
Public Service Commission of the State of New York, Long Island Lighting Co., et al.	

[June 22, 1959.]

MR. JUSTICE CLARK delivered the opinion of the Court.

This proceeding tests the jurisdiction, as well as the discretion, of the Federal Power Commission in the certificating of the sale of natural gas under § 7 (e) of the Natural Gas Act of 1938, 52 Stat. 821, as amended, 15 U. S. C. § 717 *et seq.*[1] The Commission has issued a

[1] Section 7 (e), 15 U. S. C. § 717f (e), provides:

"(e) Except in the cases governed by the provisos contained in subsection (c) of this section, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operation, sale, service, construction, extension, or acquisition covered by the application, if it is found that the applicant is able and willing properly to do the acts and to perform the service proposed and to conform to the provisions of the Act and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, sale, operation, construction, extension,

certificate of public convenience and necessity to petitioners, producers of natural gas[2] to sell to petitioner Tennessee Gas Transmission Co. 1.67 trillion cubic feet of natural gas at an initial price of 22.4 cents per MCF, including a tax of 1 cent per MCF. *Continental Oil Co., et al.*, 17 F. P. C. 880. In the same proceeding and on the same evidence it had twice refused to issue such an unconditional certificate because of "insufficient evidence or testimony . . . on which to base a finding that the public convenience and necessity requires the sale of these volumes of gas at the particular rate level here proposed." On the second occasion it proposed to petitioners that the certificates be conditioned upon an initial price of 18 cents per MCF (including the 1-cent tax), to be increased to 22.4 cents per MCF (including the 1-cent tax) after the first 24-hour delivery period, the latter rate to be subjected to the "just and reasonable" provisions of § 4 of the Act, 15 U. S. C. § 717c. The petitioners refused this proposal, and Tennessee advised the Commission that unless the certificates were issued without such conditions, CATCO would not dedicate its gas to the interstate market. Upon rehearing, after argument but without additional evidence, the Commission issued the certificates declaring "important as is the issue of price, that as far as the public is concerned, the precise charge that is made initially is less important than the assurance of this great supply of gas" for interstate markets. 17 F. P. C., at 881.

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or acquisition, to the extent authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied. The Commission shall have the power to attach to the issuance of the certificate and to the exercise of the rights granted thereunder such reasonable terms and conditions as the public convenience and necessity may require."

[2] These are the Atlantic Refining Company, Cities Service Production Company, Continental Oil Company, and Tidewater Oil Company, all petitioners in No. 518 and sometimes known as CATCO.

The respondents, other than the Public Service Commission of the State of New York, are public utilities in New York and New Jersey. They buy gas from petitioner Tennessee for distribution in those States. They and the New York Commission oppose the issuance of the certificates on the ground that their issuance will increase the price of gas to consumers in those States, of whom there are over a million, using Tennessee's gas. Upon the issuance of the certificates the respondents filed petitions for review with the Court of Appeals. It held that "Congress has not given the Commission power to inquire into the issue of public convenience and necessity where, as here, the applicant circumscribes the scope of that inquiry by attaching a condition to its application requiring the Commission to forego the consideration of an element which may be necessary in the formulation of its judgment." *Public Service Comm'n of N. Y.* v. *Federal Power Comm'n*, 257 F. 2d 717, 723. Concluding that the Commission had no jurisdiction to conduct such "a *limited* inquiry," *ibid.*, it vacated the order granting the certificates and remanded the case to the Commission. The importance in the administration of the Act of the questions thus posed required the granting of certiorari, 358 U. S. 926 (1959). We have concluded that the Court of Appeals was in error in deciding that the Commission had no jurisdiction. However, for reasons hereafter developed we hold that the order of the Commission in granting the certificates was in error and we, therefore, affirm the judgment of the Court of Appeals.

The natural gas involved here is of a Miocene sand located below sea-bed out in the Gulf of Mexico some 15 to 25 miles offshore from Cameron and Vermillion Parishes, Louisiana. The petitioners in No. 518 are each independent natural gas producers. They jointly own oil and gas leases (25% to each company) which they obtained from Louisiana covering large acreages of the

Continental Shelf off the Louisiana coast. Jurisdiction over the Continental Shelf is claimed by the United States and the question is now in litigation. The Congress has continued existing leases in effect pending the outcome of the controversy over the title. 67 Stat. 462, 43 U. S. C. (Supp. I, 1954) §§ 1331–1343. The four companies' joint venture has resulted in the discovery of huge fields of natural gas and they have dedicated some 1.75 trillion cubic feet of gas from 95,000 acres of their leases to the petitioners Tennessee Gas Transmission Company, a natural gas company subject to the jurisdiction of the Commission.[3] The latter is the petitioner in No. 536 which has been consolidated with No. 518.

The four contracts dedicating the gas to Tennessee run from each of the petitioner producers. The contracts call for an initial price of 22.4 cents per MCF for the gas, including 1-cent tax, with escalation clauses calling for periodic increases in specific amounts.[4] In addition, they provide for Tennessee to receive the gas at platforms on the well sites out some 15 to 25 miles in the Gulf. This requires it to build approximately 107 miles of pipeline from its nearest existing pipeline point to the offshore platforms at wellhead. The estimated cost was $16,315,412. It further appears that the necessity for the certificates was based on an application of Tennessee, Docket G–11107, in which Tennessee requested certification to

[3] Tennessee operates a pipeline system extending from gas fields in Texas and Louisiana through Arkansas, Mississippi, Tennessee, Kentucky, West Virginia, Ohio, Pennsylvania, New Jersey, New York and into Massachusetts, New Hampshire, Rhode Island and Connecticut. It serves some 80 distributing companies which in turn serve millions of consumers in the various States through which its pipeline traverses.

[4] These increases were later limited to 2 cents per MCF. The escalation clauses apparently were inserted in lieu of "favored nation" clauses, but by letter, not a part of the contracts, "favored nation" clauses were to be substituted at a later date on certain contingencies.

enlarge and extend its facilities. This program included the building of a pipeline from southeast Louisiana to Portland, Tennessee, which would carry a large proportion of the gas from these leases. Its cost was estimated at $85,000,000. In addition the contracts provide that Tennessee give free carriage from the wells to the shore of all condensate or distillate in the gas for the account of producers who have the option to separate it from the gas at shore stations. We need not discuss the contract provisions more minutely, though respondents do claim that other requirements place a greater burden on Tennessee and in practical effect increase the stated price of the gas to it.

The Presiding Examiner on March 29, 1957, found that the sales were required by the public convenience and necessity. *Continental Oil Co., et al.*, 17 F. P. C. 563. While he found that the proposed price was higher than any price Tennessee was then paying he pointed to other prices currently paid for onshore sales "for smaller reserves and smaller future potentials." *Id.*, at 571. The average weighted cost of gas to Tennessee he found would be increased, if the contract price was certificated, by .97 cents per MCF.[4] However, he said that no showing had been made that this would lead to an increase in

[4] The exact finding is as follows:

"Including the gas which Tennessee proposes to purchase under these contracts, some 240,000 M. c. f. per day (14.73 p. s. i. a.), it is estimated that the weighted average cost of all gas to Tennessee in 1958 will be some 13.70 cents per M. c. f., as compared with 12.73 cents if the gas here proposed to be purchased is excluded." 17 F. P. C. 563, 570.

Thus is the .97-cent figure derived. It is, however, a misleading figure, for the estimate for 1958 includes the 22.4-cent gas for only two months of 1958, November and December. There is no indication in the record as to what the cost increase would be if the weighted average were calculated by including the 22.4-cent gas for the full year.

Tennessee's rates to jurisdictional customers or result in an increase in the price governing its other purchases. He refused to condition the certificates on the acceptance of a lower price by the parties on the ground that no "showing of imprudence or of abuse of discretion by management," *ibid.*, had been made that indicated the proposed price could not be accepted temporarily as consistent with the public convenience and necessity, pending review in § 5 (a) proceeding. However, he did condition his recommendation on the approval of Tennessee's application in Docket G–11107 above mentioned.

The Commission, as we have indicated, took three strikes at the recommendations of the Examiner. On April 22 it reversed his finding on public convenience and necessity because the evidence was insufficient as to price. It said:

> "The importance of this issue in certificating this sale cannot easily be overemphasized. This is the largest reserve ever committed to one sale. This is the first sale from the newly developed offshore fields from which large proportions of future gas supplies will be taken. This is the highest price level at which the sale of gas to Tennessee Gas has been proposed.
>
> "These factors make it abundantly evident that, in the public interest, this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest." *Id., at* 575.

The Commission granted petitioners temporary certificates and remanded the proceeding to the Examiner "to determine at what rates the public convenience and necessity requires these sales" of natural gas to Tennessee under a permanent certificate. *Id.*, at 576. The producers immediately moved for modification, asserting that they

could not present sufficient evidence "within any reasonable period in the future" to meet the necessities of the remand and, further, could not "afford to commence construction until at least the initial rate [question] is resolved." The Commission on May 20, however, reiterated its belief that "the record does not contain sufficient evidence on which to base a finding that the public convenience and necessity requires the sale of the gas at that particular rate level." 17 F. P. C. 732, 733–734. In an effort to ameliorate the situation represented by the producers, the Commission did grant the certificates but conditioned them upon the producers' acceptance of an initial price of 17 cents per MCF (plus the 1-cent tax), which was the highest price theretofore paid by Tennessee in the Southwest. It also agreed that one day after the commencement of deliveries of gas the 17-cent price would be escalated to 21.4 cents (plus 1 cent for taxes), the increase to be collected under bond, subject to proof and refund under the provisions of § 4 of the Act. This time Tennessee sought rehearing advising the Commission that the producers would not accept the 17-cent initial price order of May 20 and that "the contracts will be terminated" with the consequent "loss of natural gas supplies" required for Tennessee's customers. The Commission, after oral argument, did not withdraw its previous findings in the matter but predicated its third order on "the primary consideration that the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas. . . . In view of these circumstances and the fact that the record does not show that the 21.4-cent [plus 1 cent for taxes] rate is necessarily excessive, we agree with the presiding examiner that this certificate proceeding . . . should not assume the character of a rate proceeding under Section 5 (a)." 17 F. P. C. 880, 881. Asserting that it was of the opinion that it would be able "to adequately protect the public interest with respect

to the matter of price," *ibid.*, it ordered the certificates issued and directed that since the price "is higher than Tennessee Gas is paying under any other contract, it should be subject to prompt investigation under Section 5 (a) as to its reasonableness." *Id.*, at 882.

We note that the Commission did not seek certiorari here but has filed a brief *amicus curiae*.* It does not urge reversal of the judgment but attacks the ground upon which the Court of Appeals bottomed its remand, namely, lack of Commission jurisdiction to consider the limited proposal of petitioners. The Commission's brief suggests that the Court not reach the issue tendered by petitioners, *i. e.*, must the Commission, in a § 7 proceeding, decide whether the proposed initial rate is just and reasonable? Instead, the Commission says, if the judgment must be affirmed it would be better to base the affirmance on the ground that its order "was not supported by sufficient evidence, and hence constituted an abuse of discretion in the circumstances of the particular case. . . ." Brief for the Federal Power Commission, p. 31. Petitioners oppose such a disposition contending the evidence was quite substantial.

I. Jurisdiction of the Commission.

The Court of Appeals thought that the Commission had no jurisdiction to consider petitioners' proposal because it was limited to a firm price agreed upon by the parties applicant. Their refusal to accept certification at a lower price, even to the extent of canceling their contracts and withholding the gas from interstate commerce, the court held, resulted in the Commission's losing jurisdiction. We do not believe that this follows. No sales, intra- or interstate, of gas had ever been made

* The brief is not signed by the Solicitor General but by both the General Counsel and the Solicitor of the Federal Power Commission.

from the leases involved here. The contracts under which the petitioners proposed to sell the gas in the interstate market were all conditioned on the issuance of certificates of public convenience and necessity. A failure by either party to secure such certificates rendered the contracts subject to termination. Certainly the filing of the application for a certificate did not constitute a dedication to the interstate market of the gas recoverable under these leases. Nor is there doubt that the producers were at liberty to refuse conditional certificates proposed by the Commission's second order. While the refusal might have been couched in more diplomatic language, it had no effect on the Commission's power to act on the rehearing requested. Even though the Commission did march up the hill only to march down again upon reaching the summit we cannot say that this about-face deprived it of jurisdiction. We find nothing illegal in the petitioners' rejection of the alternative price proposed by the Commission and their standing firm on their own.

II. The Validity of the Order.

The purpose of the Natural Gas Act was to underwrite just and reasonable rates to the consumers of natural gas. *Federal Power Comm'n v. Hope Natural Gas Co.*, 320 U. S. 591 (1944). As the original § 7 (c) provided, it was "the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." 52 Stat. 825.[7] The Act was so framed as to

[7] The 1942 amendments to § 7, 56 Stat. 83, were not intended to change this declaration of purpose. See Hearings, House Interstate and Foreign Commerce Committee, on H. R. 5249, 77th Cong., 1st Sess. 18–19; H. R. Rep. No. 1290, 77th Cong., 1st Sess.; S. Rep. No. 948, 77th Cong., 2d Sess.

afford consumers a complete, permanent and effective bond of protection from excessive rates and charges. The heart of the Act is found in those provisions requiring initially that any "proposed service, sale, operation, construction, extension, or acquisition . . . will be required by the present or future public convenience and necessity," § 7 (e), 15 U. S. C. § 717f (e), and that all rates and charges "made, demanded or received" shall be "just and reasonable," § 4, 15 U. S. C. § 717 (c). The Act prohibits such movements unless and until the Commission issues a certificate of public convenience and necessity therefor, § 7 (c), 15 U. S. C. § 717f (c). Section 7 (e) vests in the Commission control over the conditions under which gas may be initially dedicated to interstate use. Moreover, once so dedicated there can be no withdrawal of that supply from continued interstate movement without Commission approval. The gas operator, although to this extent a captive subject to the jurisdiction of the Commission, is not without remedy to protect himself. He may, unless otherwise bound by contract, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp.*, 350 U. S. 332 (1956), file new rate schedules with the Commission. This rate becomes effective upon its filing, subject to the 5-month suspension provision of § 4 and the posting of a bond, where required. This not only gives the natural gas company opportunity to increase its rates where justified but likewise guarantees that the consumer may recover refunds for moneys paid under excessive increases. The overriding intent of the Congress to give full protective coverage to the consumer as to price is further emphasized in § 5 of the Act, 15 U. S. C. § 717d, which authorizes the Commission *sua sponte*, or otherwise, to institute an investigation into existing rates and charges and to fix them at a just and reasonable level. Under this section, however, the rate found by the Commission to be just and reasonable becomes effective

prospectively only. Gas purchasers, therefore, have no protection from excessive charges collected during the pendency of a § 5 proceeding.

In view of this framework in which the Commission is authorized and directed to act, the initial certificating of a proposal under § 7 (e) of the Act as being required by the public convenience and necessity becomes crucial. This is true because the delay incident to determination in § 5 proceedings through which initial certificated rates are reviewable appears nigh interminable. Although *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672, was decided in 1954, cases instituted under § 5 are still in the investigative stage. This long delay, without the protection of refund, as is possible in a § 4 proceeding, would provide a windfall for the natural gas company with a consequent squall for the consumers. This the Congress did not intend. Moreover, the fact that the Commission was not given the power to suspend initial rates under § 7 makes it the more important, as the Commission itself says, that "this crucial sale should not be permanently certificated unless the rate level has been shown to be in the public interest." 17 F. P. C. 563, 575.

This is especially true where, as here, the initial price will set a pattern in an area where enormous reserves of gas appear to be present. We note that in petitioners' proof a map of the Continental Shelf area off of the coast of Louisiana shows that the leases here involved cover but 17 out of a blocked-out area covering some 900 blocks of 5,000 acres each. The potential of this vast acreage, in light of discoveries already made as shown by the record, is stupendous. The Commission has found that the transaction here covers the largest reserve ever committed to interstate commerce in a single sale. Indications are that it is but a puff in comparison to the enormous potentials present under the sea-bed of the Gulf. The price certificated will in effect become the floor for

future contracts in the area. This has been proven by conditions in southern Louisiana where prices have now vaulted from 17 cents to over 23 cents per MCF. New price plateaus will thus be created as new contracts are made and unless controlled will result in "exploitation" at the expense of the consumer, who eventually pays for the increases in his monthly bill.

It is true that the Act does not require a determination of just and reasonable rates in a § 7 proceeding as it does in one under either § 4 or § 5. Nor do we hold that a "just and reasonable" rate hearing is a prerequisite to the issuance of producer certificates. What we do say is that the inordinate delay presently existing in the processing of § 5 proceedings requires a most careful scrutiny and responsible reaction to initial price proposals of producers under § 7. Their proposals must be supported by evidence showing their necessity to "the present or future public convenience and necessity" before permanent certificates are issued. This is not to say that rates are the only factor bearing on the public convenience and necessity, for § 7 (e) requires the Commission to evaluate all factors bearing on the public interest. The fact that prices have leaped from one plateau to the higher levels of another, as is indicated here, does make price a consideration of prime importance. This is the more important during this formative period when the ground rules of producer regulation are being evolved. Where the application on its face or on presentation of evidence signals the existence of a situation that probably would not be in the public interest, a permanent certificate should not be issued.

There is, of course, available in such a situation, a method by which the applicant and the Commission can arrive at a rate that is in keeping with the public convenience and necessity. The Congress, in § 7 (e), has authorized the Commission to condition certificates in

such manner as the public convenience and necessity may require. Where the proposed price is not in keeping with the public interest because it is out of line or because its approval might result in a triggering of general price rises or an increase in the applicant's existing rates by reason of "favored nation" clauses or otherwise, the Commission in the exercise of its discretion might attach such conditions as it believes necessary.

This is not an encroachment upon the initial rate-making privileges allowed natural gas companies under the Act, *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra,* but merely the exercise of that duty imposed on the Commission to protect the public interest in determining whether the issuance of the certificate is required by the public convenience and necessity, which is the Act's standard in § 7 applications. In granting such conditional certificates, the Commission does not determine initial prices nor does it overturn those agreed upon by the parties. Rather, it so conditions the certificate that the consuming public may be protected while the justness and reasonableness of the price fixed by the parties is being determined under other sections of the Act. Section 7 procedures in such situations thus act to hold the line awaiting adjudication of a just and reasonable rate. Thus the purpose of the Congress "to create a comprehensive and effective regulatory scheme," *Panhandle Eastern Pipe Line Co.* v. *Public Service Comm'n of Indiana,* 332 U. S. 507, 520 (1947), is given full recognition. And § 7 is given only that scope necessary for "a single statutory scheme under which all rates are established initially by the natural gas companies, by contract or otherwise, and all rates are subject to being modified by the Commission . . . ." *United Gas Pipe Line Co.* v. *Mobile Gas Service Corp., supra,* at 341. On the other hand if unconditional certificates are issued where the rate is not clearly shown to be required by the public conven-

ience and necessity, relief is limited to § 5 proceedings, and, as we have indicated, full protection of the public interest is not afforded.

Our examination of the record here indicates that there was insufficient evidence to support a finding of public convenience and necessity prerequisite to the issuance of the permanent certificates. The witnesses tendered developed little more information than was included in the printed contracts. As the proposed contract price was higher than any paid by Tennessee, including offshore production in the West Delta area of Louisiana, it is surprising that evidence, if available, was not introduced as to the relative costs of production in the two submerged areas. Moreover the record indicates that the proposed price was some 70% higher than the weighted average cost of gas to Tennessee; still no effort was made to give the "reason why." More damaging, was the evidence that this price was greatly in excess of that Tennessee pays from any lease in southern Louisiana. Likewise the $16,000,000 pipeline to the producers' wells was unsupported by evidence of practice or custom. Respondents contend—and it stands undenied—that this alone would add 2 cents per MCF to the cost of the gas. Again the free movement of distillates retained by the producers was "shrugged off" as being *de minimis*, without any supporting data whatever. Nor was the evidence as to whether the certification of this price would "trigger" increases in leases with "favored nation" clauses convincing, and the claim that it would not lead to an increase in rates by Tennessee was not only unsupported but has already proven unfounded.[8]

[8] Tennessee has subsequently filed an application with the F. P. C. requesting higher rates designed to produce some $19,000,000 additional annual revenue. *Tennessee Gas Transmission Co.*, Docket G–17166.

Nor do we find any support whatever in the record for the conclusory finding on which the order was based that "the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas." 17 F. P. C. 880, 881. Admittedly any such need was wrapped up in the Commission's action in Docket G–11107, where Tennessee was asking for permission to enlarge its facilities. However, the two dockets were not consolidated and the Presiding Examiner conditioned his approval here on the granting of the application in Docket G–11107, no part of which record is here. Neither is there evidence supporting the finding that the producers "would seek to dispose of their gas elsewhere than to Tennessee Gas and the interstate market," *ibid.* While the Commission says that statements were made in argument, apparently by counsel, that this was the case, we find no such testimony. Since some 90% of all commercial gas moves into the interstate market, the sale of such vast quantities as available here would hardly be profitable except interstate.

These considerations require an affirmance of the judgment with instructions that the applications be remanded to the Commission for further proceedings.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

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[June 22, 1959.]

MR. JUSTICE HARLAN, whom MR. JUSTICE FRANKFURTER joins, concurring.

I agree with the judgment of the Court on the ground that the findings upon which the Commission based its conclusion that the public convenience and necessity required the issuance to petitioners of unconditional final certificates find no support in the record. There is no evidence supporting what appear to be the crucial findings that (1) "the public served through the Tennessee Gas system is greatly in need of increased supplies of natural gas," particularly insofar as this finding implies that this need is immediate and cannot be satisfied from Tennessee's existing reserves, and (2) that there

was serious danger that producer petitioners' gas would be permanently lost to the interstate market unless an unconditional certificate were granted on their terms. This makes it unnecessary to consider at this stage any of the other questions sought to be presented by the parties.